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In the Supreme Court

OF THE

United States

OCTOBER TERM 1973

No. 73-1607

HAWAIIAN AIRLINES, INC., *Petitioner,*

vs.

ALOHA AIRLINES, INC., *Respondent.*

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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Petitioner Hawaiian Airlines, Inc. prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit (Court of Appeals No. 73-1557) entered in the above entitled case on November 29, 1973. A petition for rehearing and suggestion for rehearing in banc was denied in this case by the Court of Appeals on January 29, 1974.

OPINIONS BELOW

The opinions of the District Court for the District of Hawaii denying petitioner-defendant Hawaiian Airlines,

Inc.'s (hereinafter "HAL" or "Hawaiian") motions for summary judgment were filed on October 11, 1972 and February 16, 1973 and are reported as follows: *Aloha Airlines, Inc. v. Hawaiian Airlines, Inc.*, 349 F.Supp. 1064 (D. Haw. 1972); *Aloha Airlines, Inc. v. Hawaiian Airlines, Inc.*, 58 F.R.D. 429 (D. Haw. 1973). A copy of each opinion is attached as Appendix A to this petition.

Thereafter, HAL's petition for interlocutory appeal was granted by the United States Court of Appeals for the Ninth Circuit. On November 29, 1973, the Court of Appeals affirmed the rulings of the District Court. That opinion is reported as follows: *Aloha Airlines, Inc. v. Hawaiian Airlines, Inc.*, 489 F.2d 203 (9th Cir. 1973). A copy of the Court of Appeals' opinion is attached as Appendix B to this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on November 29, 1973. Petitioner HAL filed a petition for rehearing and suggestion for rehearing in banc which was denied by the Court of Appeals on January 29, 1974. (A copy of order denying rehearing is attached as Appendix C to this petition.)

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254.

QUESTIONS PRESENTED

The ruling of the Court of Appeals below is directly contrary to this Court's decisions concerning the exclusive jurisdiction of the Civil Aeronautics Board (herein-

after "CAB"). See *Pan American World Airways, Inc. v. United States,* 371 U.S. 296 (1963) and, more recently, *Hughes Tool Co. v. Trans World Airlines, Inc.,* 409 U.S. 363, 93 S.Ct. 647 (1973). Specifically, the issues presented herein are:

1. Given the broad and plenary regulatory authority of the CAB over the airline industry, and given the comprehensive supervision and control which has been and continues to be exercised by the CAB with respect to the specific allegations of the present antitrust complaint filed by Aloha against HAL, does the CAB have exclusive jurisdiction, subject to judicial review, inasmuch as the case concerns matters which, like scheduling and mergers, are in the "mainstream" of the CAB's authority, have been "extensively dealt" with by the CAB, and are not "unrelated to any function of the CAB"?

2. Where the CAB has authorized both Aloha and HAL to schedule flights and compete over identical air routes—a situation which is unique in the airline industry—are Aloha's antitrust claims, which relate to HAL's flight schedules over the CAB authorized routes, matters which are exclusively within the CAB's expertise and under that Board's exclusive jurisdiction?

3. Did the CAB approved scheduling agreement between Aloha and HAL, and the CAB's continuing jurisdiction, control and surveillance over that agreement and the current practices of the parties preclude the District Court from exercising antitrust jurisdiction which may conflict with or frustrate the prospective competitive relationship of the two airlines? *Hughes Tool Co. v. Trans World Airlines, Inc.,* supra.

4. Did Aloha's initiation and pursuit of its administrative remedies before the CAB—including the receipt of a monetary subsidy award—constitute an election of remedies which precludes this present antitrust action? *Carnation Co. v. Pacific Westbound Conference,* 383 U.S. 213, 224 (1966).

5. Is Aloha precluded from basing its claim of attempting to monopolize against HAL on HAL's appearance and participation in CAB subsidy proceedings? *Eastern Railroad Conference v. Noerr Motor Freight,* 365 U.S. 127 (1961); *California Trnasport Co. v. Trucking Unlimited,* 404 U.S. 508 (1972).

6. In an action involving claims of unfair competitive practices between two airlines, does the CAB have primary jurisdiction which should be utilized, by reason of the Board's expertise, in aid of the federal court's determination of jurisdiction and the merits of the dispute? *Ricci v. Chicago Mercantile Exchange,* 409 U.S. 289, 93 S.Ct. 573 (1973).

STATUTES INVOLVED

(1) Sherman Act, Section 2 (15 U.S.C. §2) provides:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year or by both said punishments, in the discretion of the court."

(2) Federal Aviation Act, Section 401, (49 U.S.C. §1371) provides in pertinent part:

(a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation.

Application

(b) Application for a certificate shall be made in writing to the Board and shall be so verified, shall be in such form and contain such information, and shall be accompanied by such proof of service upon such interested persons, as the Board shall by regulation require.

Notice Of Application; Filing Of Protest Or Memorandum; Hearing

(c) Upon the filing of any such application, the Board shall give due notice thereof to the public by posting a notice of such application in the office of the secretary of the Board and to such other persons as the Board may by regulation determine. Any interested person may file with the Board a protest or memorandum of opposition to or in support of the issuance of a certificate. Such application shall be set for public hearing, and the Board shall dispose of such application as speedily as possible.

Issuance

(d) (1) The Board shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions

of this chapter and the rules, regulations, and requirements of the Board hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied.

* * * * *

Terms, Conditions, And Limitations

(e) (1) Each certificate issued under this section shall specify the terminal points and intermediate points, if any, between which the air carrier is authorized to engage in air transportation and the service to be rendered; and there shall be attached to the exercise of the privileges granted by the certificate, or amendment thereto, such reasonable terms, conditions, and limitations as the public interest may require.

(3) Federal Aviation Act, Section 411 (49 U.S.C. §1381):

Methods Of Competition

The Board may, upon its own initiative or upon complaint by any air carrier, foreign air carrier, or ticket agent, if it considers that such action by it would be in the interest of the public, investigate and determine whether any air carrier, foreign air carrier, or ticket agent has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof. If the Board shall find, after notice and hearing, that such air carrier, foreign air carrier, or ticket agent is engaged in such unfair or deceptive practices or unfair methods of competition, it shall order such air carrier, foreign air carrier, or ticket agent to cease and desist from such practices or methods of competition. Pub.L. 85-726, Title IV, §411, Aug. 23, 1958, 72 Stat. 769.

(4) Federal Aviation Act, Section 412 (49 U.S.C. §1382):

Pooling And Other Agreements; Filing; Approval By Board

(a) Every air carrier shall file with the Board a true copy, or, if oral, a true and complete memorandum, of every contract or agreement (whether enforceable by provisions for liquidated damages, penalties, bonds, or otherwise) affecting air transportation and in force on the effective date of this section or hereafter entered into, or any modification or cancellation thereof, between such air carrier and any other air carrier, foreign air carrier, or other carrier for pooling or apportioning earnings, losses, traffic, service, or equipment, or relating to the establishment of transportation rates, fares, charges, or classifications, or for preserving and improving safety, economy, and efficiency of operation, or for controlling, regulating, preventing, or otherwise eliminating destructive, oppressive, or wasteful competition, or for regulating stops, schedules, and character of service, or for other cooperative working arrangements.

(b) The Board shall by order disapprove any such contract or agreement, whether or not previously approved by it, that it finds to be adverse to the public interest, or in violation of this chapter, and shall by order approve any such contract or agreement, or any modification or cancellation thereof, that it does not find to be adverse to the public interest, or in violation of this chapter; except that the Board may not approve any contract or agreement between an air carrier not directly engaged in the operation of aircraft in air transportation and a common carrier subject to the Interstate Commerce Act, as amended, governing the compensation to be received by such

common carrier for transportation services performed by it. Pub.L. 85-726, Title IV, §412, Aug. 23, 1958, 72 Stat. 770.

(5) Federal Aviation Act, Section 414 (49 U.S.C. §1384:

Legal Restraints

Any person affected by any order made under sections 1378, 1379, or 1382 of this title shall be, and is hereby, relieved from the operations of the "antitrust laws", as designated in section 12 of Title 15, and of all other restraints or prohibitions made by, or imposed under, authority of law, insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order. Pub. L. 85-726, Title IV, §414, Aug. 23, 1958, 72 Stat. 770.

STATEMENT OF THE CASE

(A) Nature of the Case and Disposition By the Court Below

This is a private treble damage antitrust action initiated by Aloha against HAL pursuant to Section 4 of the Clayton Act. (15 U.S.C. §15.) Aloha and HAL are competing air carriers incorporated under the laws of the State of Hawaii with their principal offices located in Honolulu, Hawaii. As air carriers, both operate under certificates of public convenience and necessity granted by the CAB and are subject to comprehensive federal statutory and regulatory provisions promulgated by Congress and the CAB. (R. 84.)

In its original and first amended complaints, Aloha alleged that, beginning in 1968, defendant HAL attempted

to monopolize the inter-island air transportation market in violation of Section 2 of the Sherman Act (15 U.S.C. §2) and related statutes of the State of Hawaii (Hawaii Revised Statute, §§480-2 and 9).[1] (R. 4-6; 21.) Aloha listed seven acts which defendant allegedly undertook "with the predatory intent and purpose." These are: (1) excessive flight schedules; (2) excessive purchasing, ordering, leasing (or agreeing to lease) of aircraft, (3) misrepresenting its schedule to the public; (4) providing below cost servicing to interstate air carriers between stops; (5 and 6) publicizing the fact that plaintiff and defendant should merge while renouncing, allegedly in bad faith, merger plans in which the parties had entered; and (7) opposing before the CAB plaintiff's request for a subsidy. (R. 21-23.) As a result of these alleged practices, Aloha claims that it was damaged in the amount of $7,700,000.00 and prayed for treble damages under Section 4 of the Clayton Act. (15 U.S.C. §15.) (R. 23-24; 89-90.)

Aloha, in its second amended complaint, also alleged violations of Section 1 of the Sherman Act, adding to its original complaint only that HAL had engaged in the above activity with the consent and advice of the Chase Manhattan Bank of New York. (R. 86.) Aloha's motion to add Chase as a party defendant in the action was denied. (R. 64-66, 104.)

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[1]If, as appellant Hawaiian here contends, the CAB has exclusive jurisdiction over the present dispute, the immunity from judicial antitrust sanctions would apply to state as well as federal antitrust and unfair competition provisions. In effect, the state antitrust laws' application to the airline industry would be preempted by federal statutory policy and constitute an undue burden on interstate commerce in that industry. *Flood v. Kuhn*, 407 U. S. 258 (1972).

HAL moved to dismiss and for summary judgment on the grounds that the CAB had exclusive or at least primary jurisdiction over the case. The District Court denied petitioner HAL's motions to dismiss and for summary judgment (349 F.Supp. 1064) and also denied HAL's motion for reconsideration (58 F.R.D. 429) which petitioner filed in light of this Court's recent rulings in *Hughes Tool,* supra, and *Ricci,* supra. (R. 61, *et seq.*)[2] The District Court, however, did certify the question to the Court of Appeals and permission for interlocutory appeal pursuant to 28 U.S.C. §1292 (b) was granted. (R. 105.)

(B) Statement of Facts

1. The Parties

Aloha Airlines, Inc. and Hawaiian Airlines, Inc. are air carriers incorporated under the laws of the State of Hawaii with their principal offices located in Honolulu, Hawaii. (R. 83-84.) As air carriers, both parties operate subject to comprehensive federal statutory and regulatory provisions promulgated by Congress and the Civil Aeronautics Board. (Hereinafter "CAB".) Both parties, operating by virtue of certificates of public convenience and

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[2]A number of other pre-trial motions and orders are also important to a full understanding of the present posture of this case in the District Court. HAL here contends that the CAB has exclusive (or, at least, primary) jurisdiction over the matters alleged in Aloha's antitrust complaint. After the denial of HAL's motions to dismiss the complaint and for summary judgment, HAL filed its answers and counterclaim. (R. 38-56.) HAL contended, *inter alia,* that Aloha had also attempted to monopolize the relevant interisland market in violation of Section 2 of the Sherman Act (15 U. S. C. §2.) On March 30, 1973, Aloha's motion to dismiss third and fourth counterclaims was granted, with the District Court ruling that such counterclaims were within the exclusive jurisdiction of the CAB and hence immune from judicial antitrust sanctions under *Hughes Tool Co.,* supra. (R. 105.)

necessity issued to them by the CAB, provide nearly all air transportation of persons, property and mail between the various islands of the State of Hawaii. (R. 84.) In providing such transportation, the two airlines are closely regulated and supervised by the CAB. Indeed, the CAB has jurisdiction as to any disputes which arise between the parties concerning allegations of unfair practices or anticompetitive conduct by one air carrier as against another.

As will be shown below, the CAB has jurisdiction over the very matters of which plaintiff Aloha complains in this antitrust proceeding. 49 U.S.C. §1381. Moreover, all or most of the matters complained of herein by Aloha have been brought for consideration and/or resolution before the CAB and many of such issues are still pending before that agency. (R. 27-29; 61.)

2. The Nature of the Proceedings Before the Civil Aeronautics Board as Such Relate to the Present Antitrust Action.

Initially, it must be recognized that Aloha's principal antitrust claim against HAL relates to scheduling practices. The competitive impact of the two airlines scheduling of flights, however, relates directly to the judgment of the CAB in its original decision to authorize both Aloha and HAL to schedule flights over identical routes. This is the only instance known to petitioner in which the CAB has authorized identical routes for two airlines.

Moreover, Aloha and HAL have been constantly supervised and under the scrutiny and direction of the CAB in a number of other proceedings, including subsidy requests, a merger proposal, and an unfair competition enforcement proceedings concerning scheduling practices.

Petitioner HAL has filed with the Court of Appeals a separate Appendix which contains various orders, decisions and opinions of the CAB which are relevant to the antitrust claims herein. [The Appendix will be referred to in this petition as "App., p. ....."]

The CAB has repeatedly and constantly supervised and controlled the two air carriers' scheduling practices to ascertain the continuing wisdom of its decision authorizing identical routes for the two carriers. The CAB has expressed its judgment that its decision authorizing identical route authority (an anomaly existing only in Hawaii) may have "set in motion competitive forces which have led to a destructive level of competition." (App. p. 286.)

As a result of the identical routes since September 1967, the two carriers have been embroiled in fierce competition which has led the CAB (1) to consider route investigations, (2) to authorize the two airlines to discuss the possibilities of merging, and (3) to approve a scheduling agreement between the two airlines in settlement of the two carriers' complaints against each other for unfair competition. (The unfair competition cases were never determined, and the CAB dismissed these proceedings *without* prejudice and specifically retained "continuing jurisdiction" over the competitive relationship of the two carriers.) (App. p. 201.)

Aloha's complaint before the CAB alleged that HAL was attempting and had attempted to monopolize air transportation between the Hawaiian Islands in violation of Section 411 of the Federal Aviation Act of 1958, as amended, and Section 2 of the Sherman Antitrust Act. The complaint duplicated many of the charges in the

present antitrust proceeding, including the scheduling of excess flights, the operation of an excessive number of aircraft, and the misrepresentation of schedules to the public.

The CAB Bureau of Enforcement filed with the Board on April 10 its Petition for Enforcement based on the charges of the two airlines against each other. On April 16, 1970, the CAB on its own motion ordered "a comprehensive review of the route structures of the two certificated air carriers . . . ." (Docket 22118, Order 70-4-81.) (App., pp. 190, 285, et seq.)

Subsequently, Aloha and HAL entered into negotiations concerning the possible merger of the two carriers. The proposed merger was recommended for approval by a CAB Hearing Examiner, supported by the finding that Aloha was a "failing business." (CAB Docket No. 22435.) In light of this, the complaints filed by both parties regarding the other's scheduling practices were dismissed. (R. 28.)

On April 21, 1971, merger discussions were terminated by the parties. (R. 28.) On April 22, 1971, Aloha filed a motion to re-open the proceedings regarding unfair methods of competition and violations of the antitrust laws, in which both parties alleged that the other had overscheduled flights. Aloha further alleged before the CAB that the merger negotiations were conducted in bad faith. On May 10, 1971, after plans for such a merger failed to materialize, the CAB set aside its dismissal as to the overscheduling complaints in Docket Nos. 21604 and 21695 and reactivated the Aloha and HAL complaints. (App., pp. 190-191.)

On July 15, 1971, the two airlines submitted joint applications to the CAB for approval of a scheduling agreement. As part of the joint application, the parties agreed that the scheduling agreement "shall be of no effect unless . . . . (b) the agreement is acceptable to the Board as constituting a settlement or dismissal of the enforcement cases covered by Dockets 21604 and 21695 [the unfair competition and antitrust complaints]." (App., p. 196.)

On August 12, 1971, the CAB approved the agreement, retained continuing jurisdiction, but deferred approval of whether the agreement should constitute settlement of the enforcement cases on Dockets 21604 and 21695. (App., pp. 195, et seq.)

On December 30, 1971, the CAB approved the amendments to the scheduling agreement and dismissed the unfair competition complaints filed by both of the parties and covered by Dockets 21604 and 21695. (App., p. 201.)

The agreement covers scheduling practices by both airlines from July 15, 1971 to July 15, 1973. The CAB's approval of the agreement was prompted by the "unique circumstances . . . affecting the operations of Aloha and Hawaiian [Air Lines], and *the necessity for extraordinary measures to preserve completion in intra-Hawaiian service.*" (App., p. 201; emphasis added.) Moreover, pursuant to 49 U.S.C. §1382 (b), the CAB retained continuing jurisdiction over the agreement and reserved the authority to take whatever action which may be deemed appropriate regarding the scheduling practices problem. (App., p. 201.) Aloha and HAL then operated pursuant to the scheduling agreement.

An amended agreement was approved by Order 71-12-143 of the CAB dated December 30, 1971. The Board further authorized Aloha and Hawaiian to continue scheduling discussions in implementation of the agreement until July 15, 1973. Finally, the CAB dismissed the enforcement proceedings in Dockets 21604 and 21695 without prejudice. (R. 29.)

It is against this background that, on July 3, 1972, a mere six months after the CAB's approval of the scheduling agreement, plaintiff Aloha filed the present antitrust action, alleging all the various claims and contentions already submitted to and under consideration by the CAB.

REASONS FOR GRANTING THE WRIT

I. THE RULINGS OF THE COURTS BELOW MISCONSTRUE THIS COURT'S MANDATE IN PAN AMERICAN WORLD AIRWAYS, INC. v. UNITED STATES AND HUGHES TOOL CO. v. TRANS WORLD AIRLINES, INC., CONCERNING THE EXCLUSIVE JURISDICTION OF THE CIVIL AERONAUTICS BOARD AS TO DISPUTES BETWEEN AIR CARRIERS. AS SUCH, THE RULINGS BELOW THREATEN TO JEOPARDIZE REGULATORY POLICIES CONCERNING INTRA-HAWAIIAN AIR TRANSPORTATION.

A. The charges of anti-competitive conduct made by Aloha against HAL involve matters over which the CAB has jurisdiction. Indeed the CAB has exercised and continues to exercise its jurisdiction over the parties with respect to the specific dispute and contentions herein.

In *Pan American World Airways, Inc. v. United States*, 371 U.S. 296 (1963), this Court established that the CAB should have exclusive jurisdiction over acts which are ". . . basic to the regulatory scheme of the Federal Avi-

ation Act . . ." and ". . . the precise ingredients of the Board's authority . . ." (371 U.S. at p. 305.) As to such activities, a federal District Court is precluded from exercising antitrust jurisdiction.

Petitioner HAL will show that the allegations in Aloha's complaint concern activities by and between the two airlines which are clearly under the CAB's jurisdiction. The CAB has authorized the two airlines to schedule competing flights over identical routes. The CAB has held extensive hearings and made findings and orders relating to the very facts and matters covered in Aloha's present complaint. Indeed, the CAB continues to exercise jurisdiction, surveillance and control over the matters complained of by Aloha in this case.

In *Hughes Tool Co. v. Trans World Airlines, Inc.*, supra, the Court elaborated on its earlier *Pan Am* ruling where a District Court had concluded that Pan Am had violated the Sheman Act in interfering with Panagra's possible route extension:

> "(In *Pan Am)* this Court held that the complaint *should have been dismissed because §411 of the act gave the CAB broad power to investigate and bring to a halt unfair practices and unfair methods of competition, including those alleged in the complaint,* and because if the courts were to intrude independently with their own construction of the anti-trust laws the two regimes might collide. Hence, relief against the alleged division of territories, allocation of routes and conspiracy to monopolize *was a matter exclusively for the Board." Hughes Tool Co. v. Trans World Airlines, Inc.,* supra, 93 S.Ct. at p. 657. (Emphasis added.)

This language from the recent *Hughes* decision is clearly applicable to our present case. As will be shown, all of the matters raised by Aloha in charging HAL with an attempt to monopolize concern alleged unfair practices and unfair methods of competition which, by virtue of §411 of the Federal Aviation Act, are under the exclusive jurisdiction of the CAB.

As the Supreme Court observed in *Hughes:*

> "The point is that the conduct of Toolco with which the Board so extensively dealt in 1950 is the *same kind of conduct charged* to Toolco in the 1950's *and alleged by TWA in its complaint to violate the antitrust laws.* It is, therefore, difficult to understand how the Court of Appeals could conclude that the acts of Toolco in controlling, allegedly to the injury of TWA, the timing, the financing, and the flow of new equipment to TWA was unrelated to any function of the Board under the Act." *Hughes Tool Co. v. Trans World Airlines, Inc.,* 93 S.Ct. at p. 658. (Emphasis added.)

The basic allegations in the present antitrust case involve (1) the number of flights by HAL on the routes granted to it by the CAB, and (2) the manner in which HAL conducted merger negotiations with Aloha after the CAB authorized the two airlines to enter into merger negotiations and discussions. Because the airline industry is fraught with vital and complicated considerations, not the least of which is safety, it is a question of exceptional importance as to whether the CAB, with its specialized expertise in the airline industry, or lay juries, with no reasonable opportunity to become intimately knowledgeable as to all the congeries involved, should decide the

allegations by one airline that another airline had too many flights over its CAB approved routes or did not negotiate properly in the CAB approved merger negotiations. Thus, the real issue which Aloha seeks to present to the court is the wisdom of the CAB in authorizing certain activity. If Aloha prevails here, parties will be encouraged to circumvent CAB remedies in order to immediately sue, under the antitrust laws, for treble damages for past injuries.

(1) *Aloha's Claims Concerning HAL's Scheduling Practices.* An examination of the extent and nature of CAB supervision over the Aloha-HAL scheduling dispute leaves little doubt that the present antitrust action is improper. In the subsidy request filed before the CAB by Aloha, Aloha raised the very contentions and issues which have been raised in the present antitrust complaint. Of the subsidy proceedings, Aloha has stated that the CAB, in its hearing and determination, was ". . . almost totally concerned with excessive flight schedules . . ." Further, Aloha suggested that the subsidy requests and the scheduling dispute considered therein presented ". . . factual contentions (which) were peculiarly within the expertise of the CAB . . ."[3]

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[3]See Aloha's response to Hawaiian's petition for Writs of Mandamus and/or Prohibition, filed before the Court of Appeals. *Hawaiian Airlines, Inc. v. King.*, Misc. No. 73-1822. (9th Cir. 1973.) Aloha seeks to have alleged findings in the subsidy proceeding held binding on the parties in the antitrust case. Thus, Aloha concedes the close relationship between the CAB subsidy hearing and our present antitrust case. HAL, while recognizing the relationship of the CAB subsidy and judicial proceedings, vigorously opposes according collateral estoppel effect to the alleged findings in the CAB subsidy matter. The finding in the subsidy proceedings had nothing to do with unfair activity. Thus, there was no "finding" of "uneconomical competition" by HAL. Indeed, on June 24, 1971, the CAB Examiner who presided over the subsidy proceeding and

An analysis of the Examiner's Initial Decision and the opinion of the CAB in subsidy proceeding makes it clear that the Board addressed itself to the issue which is uppermost in Aloha's antitrust complaint, the scheduling practices of HAL. While a subsidy proceeding before the CAB is in the nature of an ex parte application by an air carrier for government funds,[4] the request by Aloha was joined by HAL's application for an equal subsidy grant. In connection with determining the propriety of awarding sub-

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the § 411 action refused to accord collateral estoppel effect to the subsidy findings because the subsidy proceeding, unlike the enforcement action, was not adversary in nature nor accompanied by proper quasi-judicial procedures (CAB Docket Nos. 21604 and 21695). Aloha is thus using the subsidy findings in the court below in a way which the CAB itself refused to use them.

[4]Subsidy requests are made pursuant to §406(b) of the Act, 49 U.S.C. §1376(b) which provides:

"(b) In fixing and determining fair and reasonable rates of compensation under this section, the Board, considering the conditions peculiar to transportation by aircraft and to the particular air carrier or class of air carriers, may fix different rates for different air carriers or classes of air carriers, and different classes of service. In determining the rate in each case, the Board shall take into consideration, among other factors, (1) the condition that such air carriers may hold and operate under certificates authorizing the carriage of mail only by providing necessary and adequate facilities and service for the transportation of mail; (2) such standards respecting the character and quality of service to be rendered by air carriers as may be prescribed by or pursuant to law; and (3) *the need of each such air carrier (other than a supplemental air carrier) for compensation for the transportation of mail sufficient to insure the performance of such service, and, together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense.* In applying clause (3) of this subsection, the Board shall take into consideration any standards and criteria prescribed by the Secretary of Transportation, for determining the character and quality of transportation required for the commerce of the United States and the national defense." (Emphasis added.)

sidies, the CAB comprehensively reviewed the scheduling practices of Aloha and HAL.

Of special significance, insofar as this appeal is concerned, is the fact that Aloha filed a complaint against HAL before the CAB pursuant to §411 of the Federal Aviation Act. Section 411 permits a carrier or the CAB on its own initiative to file a complaint charging another party with unfair or deceptive practices or unfair methods of competition in air transportation. In such a proceeding, the CAB conducts an investigation and determines, in the context of an adversary hearing (with appropriate procedural safeguards)[5] whether unfair practices or unfair methods of competition have been perpetrated. If such a finding is made, the CAB has the authority to order the offending party to cease and desist from such practices; moreover, the CAB retains continuing and plenary jurisdiction to insure that the airlines involved conform their practices to the needs and interest of the public and the general air transport policy of the United States. Indeed, the power of the CAB under §411 has been compared to that of an antitrust court. *Pan American World Airways, Inc. v. United States*, 371 U.S. at p. 312, note 17.

The §411 complaint filed by Aloha against HAL was docketed by the CAB on April 10, 1970. Aloha alleged that HAL had violated and was violating section 2 of the Sherman Act and section 411 of the Federal Aviation

[5]Aloha's position below concerning the collateral estoppel effect of CAB findings, if appropriate at all, should be limited to administrative determinations made in the context of a proceeding such as in §411 enforcement proceeding.

Act. Aloha based its claim on HAL's capacity and scheduling practices since 1968, after the introduction of jet aircraft, and on alleged unfair publicity regarding its schedules and misrepresentation of schedule times. These same practices are the basis of Aloha's present complaint in the antitrust court. Aloha claimed that HAL's schedules were in excess of those required by the public convenience and the volume of traffic. Aloha alleged that HAL's practices caused both carriers to suffer large losses and prevented both of them from attaining "economic load factors." It said that the severity of the financial injury to Aloha caused it to request subsidy payments. Finally, Aloha claimed that HAL's purpose in such practices was to restore a monopoly which would be harmful to the public interest. Aloha requested that the Board require HAL to cease operating excessive schedules and operate only those reasonably required by the volume of inter-island traffic.

The interim history of this proceeding was described in CAB Order 71-5-40. On June 7, 1971 Aloha filed a motion to "establish procedures." The motion contemplated discussions with HAL leading to a scheduling agreement. (The Board eventually approved an agreement and dismissed the proceedings.) However, the CAB Bureau of Enforcement opposed Aloha's motion in an "answer" dated June 16, 1971:

> "In the first place, the Bureau believes that Aloha has failed to establish a legal basis for imposing the proposed special procedures without affording Hawaiian a hearing. Secondly, [the] Bureau objects to Aloha's motion because, in our view, the special procedures which Aloha advocates as a remedy to

[HAL's] unfair methods of competition appear woefully inadequate, especially in light of the severity of offense with which [HAL] is charged.

"[HAL] is charged, *inter alia,* with an attempt to monopolize in violation of section 2 of the Sherman Act (Aloha Complaint, p. 9). Such a violation, if proven, would constitute a *per se* violation of section 411 of the Federal Aviation Act. Of course, a Sherman Act violation, or even the tendency towards one, is not essential for the Board to find a section 411 violation.

"The Bureau is presently considering the question of appropriate remedies to be applied should a section 411 unfair competitive practice be established. The Board's power to fashion appropriate relief in section 411 cases has been analogized 'to the power of courts to fashion Sherman Act decrees,' and includes at least the power to order divestiture. The Court will interfere with the Board's chosen remedy 'only where there is no reasonable relation between the remedy and the violation.'

"The major fault that we find with Aloha's proposal is that it may not go far enough, i.e., the proposal would accept the present positions of the carriers in terms of flights scheduled and market share as a base from which to proceed. If, as Aloha alleges, [HAL] engaged in unfair methods of competition, Aloha's proposed remedy may be deficient in that it allows [HAL] to continue to enjoy the fruits of its past illegal actions. We believe that some changes in the present schedules will be required, and that it will not be sufficient for the Board to passively monitor changes proposed by the parties." [CAB Dockets 21604, 21605, Answer of the Bureau of Enforcement, June 16, 1971, pp. 1-3.]

Thus the CAB and Aloha were on notice that the Board had before it the question of what it should do about the fruits of any past activity of HAL which it found illegal under §411. The fruits of that activity are the very damages which Aloha seeks as compensation from the antitrust Court. But, over the objections expressed in the Bureau's answer, the Board authorized Aloha to proceed with framing a scheduling agreement. The Board finally approved the agreement the two carriers worked out. In the approval order the Board expressly noted that the agreement was understood by the parties as a "settlement or dismissal of the cases covered by Dockets 21604 and 21605 (the scheduling cases)." Order 71-12-143, note 1. (App., p. 196.) It also expressly noted that

> ". . . absent this agreement, and failing alternative Board action, Aloha's chances of survival would be significantly lessened. Should Aloha fail, the public would, at least initially, be deprived of the significant benefits of competitive intra-Hawaiian service. Thus we believe that the approval of the amended agreement is required by an important transportation need." (App., p. 200.)

Further, the Board said

> "In view of the foregoing, we find that agreement C.A.B. 22539, and Amendment 1 thereto, will not be adverse to the public interest or in violation of the Act, and should be approved. We reiterate our prior finding that our action approving this amended agreement is *predicated upon the unique circumstances surrounding the agreement and affecting the operations of Aloha and Hawaiian, and the necessity for extraordinary measures to preserve competitive intra-Hawaiian service.*" (App., p. 201.) (Emphasis added.)

Accordingly, the Board ordered the enforcement proceedings dismissed *without prejudice,* and retained jurisdiction over the agreement to "take whatever action may be deemed appropriate." (App., p. 201.)

It certainly cannot be said that the Board, in disposing of the scheduling case, was not exercising its jurisdictional and remedial powers over the past competitive practices between the two carriers. Indeed, the Board emphasized that in its judgment the circumstances were unique, that competitive intra-Hawaiian service should be preserved, and that extraordinary measures were required to do so.

The present antitrust case thus involves the very issues, considerations and inter-relationships between Aloha and HAL which have been and still are under the jurisdiction, control and surveillance of the CAB. See *Hughes Tool Co. v. Trans World Airlines, Inc.,* supra, 93 S.Ct. at pp. 657-661. It is also important to note that both the §406 subsidy request and the §411 enforcement proceeding before the CAB were initiated by Aloha. The CAB carefully and comprehensively considered the scheduling practices of Aloha and HAL in the context of the market considerations and the over-riding federal interest in the maintenance of a well-regulated, safe, efficient, and economically healthy air transport system. After hearings, the CAB determined that injuries and losses suffered by Aloha were not the result of HAL's scheduling practices, except for losses during five and one-half months of the damage period alleged in this antitrust case. Based on this finding, Aloha was granted a subsidy award of $789,000.00. (App., p. 104.) In the Enforcement Proceed-

ing, the entire dispute concerning over-scheduling as between the two airlines was resolved by an agreement which was approved by the CAB, and under which the CAB expressly retains jurisdiction. (App., p. 201.)

For a court to now enter the scene and award antitrust damages—as Aloha presently urges—would upset the delicate balance achieved by virtue of the proceedings before the CAB and the resolutions of the dispute made and approved by that regulatory agency. Any antitrust damage award will introduce a new element that may well undo several years of regulatory activity and perhaps require new subsidy awards, amendments to the scheduling agreements and other measures which cannot be presently anticipated.

This antitrust case would, therefore, truly interfere with CAB regulatory practices concerning Aloha and HAL. This proposition cannot be denied in light of the CAB's recognition of "... the necessity for extraordinary measures to preserve competitive intra-Hawaiian service" and the Board's retention of continuing jurisdiction for the purpose of supervising the Aloha-HAL competitive relationship and implementing the necessary extraordinary measures.

(2) *Aloha's Antitrust Claims Arising Out of Merger Negotiations with HAL.* Aloha is similarly precluded from basing its antitrust complaint on alleged acts concerning the proposed merger between the two air carriers. Under 49 U.S.C. Section 1378, the CAB has explicit Congressional authority to approve mergers of the type which was attempted in our case. Moreover, any person affected by a CAB order concerning a merger is expressly granted

immunity from the operation of the antitrust laws "* * * insofar as may be necessary to enable such person to do anything authorized, approved or required by such order." 49 U.S.C. §1384.

Clearly, the public interest in maintaining a sound and efficient system of air transportation may often require the merger of air carriers. The statutes above cited insure that, in such appropriate instances, mergers may be effectuated without fear of antitrust sanctions. In our present case, Aloha and HAL entered into merger negotiations. The proposed merger was recommended for approval by a CAB Hearing Examiner. (CAB Docket No. 22435; See also App., pp. 202, et seq.) Subsequently, problems involving respective creditors of the two airlines frustrated the merger plans. Now Aloha seeks to base its antitrust claim on these merger discussions and negotiations. If such is allowed, other air carriers may, in the future, avoid merger negotiations—even though such a merger may be in the public interest—simply out of fear that the merger discussions may subject them to subsequent antitrust suits.

The merger negotiations pursued in the present case were conducted under the auspices of the CAB. A preliminary recommendation of approval had been made by a CAB Examiner. The negotiations were thus within the ambit of CAB jurisdiction. Moreover, such merger negotiations were necessarily within the purview of 49 U.S.C. Sections 1378 and 1384 and hence immune from antitrust sanctions.

In summary then, the basic allegations in Aloha's antitrust complaint are that Hawaiian overscheduled its

flights and engaged in merger negotiations in bad faith. Regardless of whether that kind of activity states a claim under the antitrust laws, both activities were "extensively dealt" with and supervised by the CAB and were not "unrelated to any function of the Board under the Act." The matter of scheduling practices was extensively considered in the subsidy proceeding. Competition in scheduling flights was inevitably and necessarily anticipated by the CAB's grant of identical route authority to the two airlines. Both the scheduling dispute and the abortive merger were the subject of Aloha's unfair competition complaint before the CAB which was settled and dismissed by virtue of the CAB approved scheduling agreement between the two airlines in July, 1971. In addition, the CAB conducted special hearings on the merger (Docket 22435), and specifically held a hearing on the reasons for the termination of the merger.

Our present case is thus a stronger one for antitrust immunity than was *Hughes*. The *Hughes* antitrust complaint was based on activity which was not specifically the subject of CAB orders. (See dissent, Chief Justice Burger, n. 18, 93 S.Ct. at pp. 669-670, which demonstrates that the alleged misconduct by Toolco although in the "mainstream" of CAB proceedings, was not specifically approved, and indeed involved activity "without Board approval of knowledge.") Among the items of damage shown by TWA was the diversion of jets from TWA to Northeast Airlines "while the proposed merger plan was pending," *Trans World Airlines, Inc. v. Hughes*, 332 F.2d 602, 605, 606 (2nd Cir. 1964) between TWA and Northeast, which was controlled by the co-conspirator Atlas

Corporation. As in the instant case, a merger was never consummated, and damages were alleged to have flown from activity pending merger negotiations. The anti-trust immunity recognized in *Hughes* is clearly applicable here.

Moreover, in its order instituting an investigation of the route structures of Aloha and HAL (Order 70-4-81, April 16, 1970), the Board called attention to the "persistently low average load factors—considerably below the 'break-even' level—which they have been reporting for some time. This raises the question of whether the carriers have been consciously scheduling more flights than the available traffic will support, and if so, what forces have induced them to act in this manner." (CAB Order 70-4-81, App., p. 286.)

The investigation arose out of the CAB's continuing concern for over-capacity in the Hawaiian market and the two carriers scheduling beyond the needs of the public.

> ". . . Our aim is to explore possible changes in the operating authority of Hawaiian and Aloha in order to determine whether any such changes could restore these carriers to a state of financial health without substantial diminution in needed air service to the traveling public. We do not intend to consider the total cancellation of either carrier's certificate, nor will we consider applications by other persons for authority to provide air service in Hawaii. Rather, the focus of the proceeding will be on whether the overall public convenience and necessity will be better served by some reduction in the present all-enveloping level of competition between the two existing carriers." (App., p. 285.)

"... There is currently pending before the Board an investigation to determine whether federal subsidy again should be awarded to either or both of these carriers, and also whether they should be permitted to raise their fares. From the pleadings filed by the carriers in this and other proceedings presently pending, it appears that the financial situation of the carriers is approaching the acute stage. We cannot safely assume that the subsidy and fare case will supply the answer to the carriers' financial problems, and we would be derelict in our responsibilities under the Act if we failed to explore other possible avenues to a resolution of these problems." (App., p. 286.)

The investigation was dismissed on March 1, 1973. (CAB Order 73-3-2.) Aloha, however, objected to the dismissal on the ground that HAL had consistently argued that the Hawaiian market could not support competition by two carriers and that the Board's purpose in ordering the investigation had not been achieved.

Whether the Hawaiian market could support competition by two carriers has been the great issue throughout the history of that market. The Board chose to make that market a competitive one when it certified Aloha. It did so because it believed that such would best serve the policies of the Federal Aviation Act. It well knew what trade-offs might be required. But the CAB's orders in the matter make it clear that the CAB's view was that until the Board itself decided that the market could not support two carriers, it could, through its own regulatory and remedial powers, assure that the policies of the Act would not suffer from those competitive trade-offs. One CAB policy was assurance of the sound financial condi-

tion of the carriers. Another was competition which was not unfair or destructive. Thus the CAB took upon itself the task of balancing the relationships of the two parties.

The present litigation is another event in that history. The great issue remains the same. The question presented here is whether the antitrust court has any business making a determination which inevitably will affect the balance and may well frustrate the CAB's extensive consideration of the inter-relationship between the two carriers.

It was established in *Pan American* and reaffirmed in *Hughes* that what must be honored is the CAB's regulatory power, not just its past orders. And it must be kept clearly in mind that that CAB regulatory power is pervasive. It reaches every corner of the industry that touches the public interest. The Board's power to protect the public interest is the common thread that weaves an integrated regime of supervision. The Board has considered the conduct of HAL that Aloha complains about here, especially the scheduling practices, in a number of proceedings under different sections of the Act. The Board has had HAL's conduct before it in subsidy proceedings, a merger proceeding, a §411 proceeding, in the approval of a scheduling agreement, and a route investigation. By its orders in each of these, the CAB has created a single integrated pattern of regulatory supervision. That pattern, however, is composed of far more than the specific matters contained in those orders. Rather that pattern is described by the very state of the industry, itself. And that pattern is the Board's statement of what best serves the public interest in Hawaii.

It is not for the antitrust court to even supervise the composition of that pattern, let alone to remake it.

Prior to the Supreme Court's reversal in *Hughes,* a plausible argument was made that since the CAB cannot award damages, an antitrust action would lie to recover for past acts. The District Court relied heavily upon this consideration in denying HAL's initial motion to dismiss the complaint. (R. 30-31.) After the Supreme Court's ruling in *Hughes,* it is clear that Aloha's position is no longer an accurate characterization of the law. The mere fact that an antitrust plaintiff in an airlines industry dispute seeks money damages does not divest the CAB of its exclusive jurisdiction over the dispute. In *Hughes,* the antitrust plaintiff sought and was awarded damages of more than $145,000,000.00. The Supreme Court, while recognizing that the CAB could not grant such damages, nevertheless ruled that CAB jurisdiction was exclusive. As Mr. Justice Douglas stated for the Court (93 S. Ct. at p. 659):

> "It is therefore no answer to say that our *Pan American* decision does not cover the alleged antitrust violations involved in the Toolco-TWA transactions for which treble damages were sought. As noted, §408(b) states that the Board shall not approve any 'acquisition of control' which would result 'in creating a monopoly or monopolies and thereby restrain competition or jeopardize another air carrier.' Moreover, the Board in granting permission to 'control' an air carrier must consider the standards of the public interest as defined in §102 of the Act.

Subsection (c) of §102 provides:

> 'The promotion of adequate, economical, and efficient service by air carriers at reasonable charges,

> without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices.' "

It is no answer in this case to state, as the Courts below ruled (R. 68), that the acts complained of were not expressly and specifically authorized, approved, or required by CAB order.

For in the present case, just as in *Hughes,* the antitrust claims flow directly from activities by HAL which were authorized by the CAB. The Court of Appeals below, in its opinion, recognized an example of immunized conduct which is identical to our situation. (489 F.2d at p. 206):

> "For example, if the CAB granted a certificate to carrier A for service between two terminal points, a competing carrier could not bring an antitrust charge against carrier A that the mere granting of the certificate *and the competition flowing from it* was in violation of the antitrust laws, *no matter how the new carrier was motivated or how destructive its competition.* Such conduct was immunized from "antitrust action by section 414, supra 49 U.S.C.A. §1384." *Opinion,* pp. 4, 5. (Emphasis added.)

There is no difference between the example of the Court of Appeals and the allegation here that HAL had too many flights over its approved routes. In addition, and of particular importance, is the fact that the Hawaiian market *alone* is the only area where the CAB in its wisdom has authorized and determined that the competing carriers should cover the same routes. (App., p. 286 Orders E-25649/50, September 7, 1967 and 70-4-81.)

Thus, HAL's scheduling practices pursuant to prior route authority granted by the CAB and HAL's merger discussions pursuant to prior approval of such negotiations by the CAB are just as immune from antitrust sanctions as was Toolco's conduct pursuant to CAB approval in the *Hughes* ruling.

It is no more doubtful in our case that the authority of the Board, either on complaint or its own initiative, extended to forbidding any scheduling practice by HAL which was not consistent with the public interest standards of the Act. This seems the clear import of the Act and the Board's 1968-1973 proceedings.

In examining the competitive situation in the relevant market, the CAB—as recently as March 1, 1973—stated (concerning the present scheduling practices and agreement between Aloha and HAL) [App., p. 289]:

> "We found in Order 71-12-143 that '. . . the agreement is making a substantial contribution to viable competition in the intra-Hawaiian markets, . . . represents progress toward alleviating over-capacity problems and holds promise of continuing to insure the survival of Aloha while allowing Hawaiian to operate at a profit.'"
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> • • • • •
>
> "At the same time, however, we are mindful that our continuing review of the carriers' scheduling practices and their operating experience may disclose a subsequent need to renew the investigation. Therefore, as recommended by the Bureau, we find that this proceeding should be dismissed without prejudice to the institution of new proceedings should conditions hereafter so require."

Thus, the CAB is closely supervising and controlling the activities of the parties herein. The CAB is satisfied with the current and past competitive relationships between Aloha and HAL and the Board is prepared to take whatever action that is necessary in the future to maintain the present competitive balance. The intrusion by the antitrust court—as permitted in the rulings below could well engender a collision between regulatory and antitrust policies. The mere possibility of such a collision requires that the CAB—not the antitrust court—be entrusted with exclusive jurisdiction over the present Aloha-HAL dispute.

B. Aloha has elected to pursue its remedies before the CAB thus further precluding its attempt to seek antitrust remedies in the Court below.

As pointed out above, not only has Aloha initiated proceedings before the CAB concerning the scheduling dispute, but the Board has extensively analyzed the entire matter, made findings and taken action on the basis of its findings.

After having urged its case before the CAB in both a subsidy proceeding and an enforcement action, Aloha reversed its position and suggested to the courts below that: (1) the CAB does not have jurisdiction insofar as the matter of scheduling is concerned; and (2) the subsidy award is completely independent of the scheduling controversy.

The erroneousness of the former contention has already been established. As to the direct relationship between the subsidy award to Aloha and its claim that it suffered losses as a result of HAL's scheduling practices, a read-

ing of the opinion of the CAB examiner and the decision of the CAB resolves all doubt.

Aloha's request for a subsidy was based on operational losses incurred during much of the relevant damage period alleged in the present complaint. Aloha alleged, before the CAB, that these losses were due to various industry conditions. Aloha further contended:

> ". . . the factor which compelled the filing of its petition [for subsidy before the CAB] was Hawaiian [Air Lines'] scheduling practices throughout 1968 and 1969 which prevented Aloha from realizing an economic operation." (Initial Decision, App., p. 11.)

The CAB fully considered the scheduling dispute (bringing its expertise in the air transport industry to bear on the matter) and determined that all losses suffered by Aloha and HAL were due to their own respective overscheduling practices except for a 5½ month period during which Aloha's losses were due to HAL's scheduling practices. Based on this finding, Aloha was awarded a subsidy for the 5½ month period.

Thus, the grant of the subsidy was the direct consequence of the CAB's findings regarding the scheduling practices of the parties herein. While it is true that the subsidy award does not entail the payment of damages or reparations by HAL to Aloha, that subsidy is nevertheless awarded to compensate Aloha for the losses it allegedly suffered as a result of HAL's scheduling practices.[6] The CAB determined that but for this 5½ month

[6]As pointed out above, this finding while relevant to the scheduling dispute between the two parties, does *not* constitute a determination that HAL engaged in unfair methods of competition.

period, Aloha's losses were due to its own uneconomic or inefficient management.

The subsidy award—as Aloha conceded below—was granted by the CAB to ". . . maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service and the national defense." (49 U.S.C. §1376(b).) Thus the CAB's ruling concerning the award in relation to the scheduling controversy was intended to promote these important national policies. Drawing upon its expertise, and considering the competitive situation between Aloha and HAL, the CAB's subsidy award to Aloha established the necessary balance between these two air carriers insofar as inter-island competition was concerned. Any antitrust damage award which flows from this case could well upset that balance and injure the economic well-being and efficiency of inter-island air transportation.

Aloha has had its administrative hearing and an award deemed appropriate by the CAB has been granted. Aloha must not be allowed to eat its cake and have it too. As Chief Justice Warren suggested in *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, 224 (1966), plaintiffs should not be able to seek recovery under both administrative and antitrust remedies. Aloha has already made its election.

From the foregoing analysis, it is clear that the lower courts' rulings in favor of antitrust jurisdiction in our present case brings about the danger of a collision between antitrust enforcement and federal regulatory policies in the airline industry. A resolution of the antitrust case

could destroy the competitive balance achieved between Aloha and HAL by the CAB through its extensive inquiry, scrutiny and regulation of the relationships between the two airlines. In such a situation, the law is clear; the antitrust court must defer to the exclusive jurisdiction of the CAB. *Hughes Tool Co. v. Trans World Airlines, Inc.*, supra; *Pan American Airways, Inc. v. United States*, supra.

C. HAL's appearances before and participation in CAB proceedings cannot be the basis for an antitrust claim.

The extent to which Aloha seeks to utilize the present antitrust action as a means of interfering with the CAB's authority and jurisdiction over the parties is further evidenced by Aloha's claim that HAL attempted to monopolize by its allegedly "predatory" appearance before the CAB in the subsidy award proceedings. (R. 88.) The District Court ruled that the Aloha allegations fall within the "sham" exception to the *Noerr* rule. (R. 32.) The lower courts' handling of this issue raises numerous questions which may be crucial to the outcome of this litigation.

It is clear from a reading of the relevant CAB opinions that HAL appeared in the various CAB proceedings to defend itself against the charges by Aloha concerning scheduling practices. HAL also sought a subsidy award for itself as compensation for losses suffered as a result of Aloha's overscheduling practices. Under Supreme Court rulings in *Eastern Railroad Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961) and—more recently—*California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 92 S.Ct. 609 (1972), an appearance before a

government agency cannot be the basis of an antitrust claim unless it is ". . . a mere sham to cover up . . . an attempt to interfere directly . . ." with a competitor. By no stretch of the imagination could HAL's appearances before the CAB be so considered. The CAB opinions before the Court leave no doubt that HAL's appearances before the Board were in response to actions initiated by Aloha and for the purpose of protecting its own interests. Indeed, HAL's position in the CAB subsidy proceeding was that it receive a subsidy award equal to that granted to Aloha. This was almost identical to the position taken by the CAB Bureau of Economics in that proceeding. (Initial Decision, App., pp. 14-15.)

Important First Amendment principles and policies preclude the use of HAL's participation before the CAB as a basis for alleged antitrust violations. As stated by the Supreme Court in the *California Motor Transport* case (92 S.Ct. at p. 612):

> "We conclude that it would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests *vis-a-vis* their competitors."

II. THE RULINGS BELOW UNDERMINE THIS COURT'S OFTEN STATED RULE OF PRIMARY JURISDICTION AND RELIANCE UPON THE EXPERTISE OF RELEVANT ADMINISTRATIVE AGENCIES TO RESOLVE DISPUTES ARISING BETWEEN PARTIES IN A REGULATED INDUSTRY.

It is petitioner's position herein that in the interests of uniform national regulation of air transportation and protection of the efficiency and economic stability of air carriers such as HAL and Aloha, the CAB has exclusive jurisdiction over the matters raised by Aloha in this litigation. At the very least, however, in light of the complexity of the issues raised in this litigation and their relationship to the regulatory policies of the CAB, the doctrine of primary jurisdiction is applicable.

A brief perusal of the lengthy CAB opinions previously alluded to herein, and the factual discussion above demonstrates beyond question the complexity of the multiple and variable factors involved in the scheduling dispute and the need for administrative expertise in order to reach an intelligent decision and one which accommodates the important regulatory policies entrusted to the CAB.

In the Court below, Aloha criticized any application of primary jurisdiction which would stay this proceeding "for some indefinite period . . . to await some unidentified decision from the CAB . . .". Yet it was Aloha itself which filed a petition for reconsideration before the CAB thus re-opening the entire scheduling controversy and re-submitting it to the Board.

More importantly, the CAB has yet to decide the merits of the unfair competition complaints which have been filed by Aloha and HAL against each other. These com-

plaints were dismissed *without prejudice* by order of the CAB when Aloha and HAL entered into their current scheduling agreement. (See App., p. 201.) From the CAB order dated December 30, 1971, it is clear that the scheduling agreement approved by the Board was deemed by all parties—as well as the CAB itself—to constitute a resolution and settlement of the charges and countercharges made in the unfair competition complaints. (App., pp. 199, 201.) These same charges have now been revived in the context of this present antitrust complaint. In its order approving the scheduling agreement and dismissing the unfair competition complaints, the Board stated (App., p. 201):

> "We reiterate our prior finding that our action approving this amended agreement is predicated upon the unique circumstances surrounding the agreement and affecting the operations of Aloha and Hawaiian, and the necessity for extraordinary measures to preserve competitive intra-Hawaiian service."

The CAB further retained continuing jurisdiction over the agreement with the authority to take ". . . whatever action may be appropriate . . ." with respect thereto. (App., p. 201.)

The present antitrust complaint revives the very contentions, arguments and considerations which were at issue before the CAB in the unfair competition proceeding. The CAB has jurisdiction to examine and resolve the charges of unfair competition. If this jurisdiction is not exclusive, it is, at least, primary. The CAB must be given the opportunity to bring its expertise to bear on the charges of unfair competition and on the type of relief which may

be appropriate in light of the ". . . necessity for extraordinary measures . . ." to preserve competitive balance. A court—in resolving antitrust claims—cannot and should not substitute its judgment for that of the CAB.

The CAB dismissed the unfair competition complaints because it believed that the dispute between Aloha and HAL had been resolved through the scheduling agreement. Aloha has attempted to circumvent the CAB's jurisdiction by re-filing its same unfair competition claims in the form of an antitrust suit, This Court must not permit such an avoidance of CAB jurisdiction. These parties must be remanded to the CAB for a full hearing and specific decision on the issues here presented. Only then will the Court be sure that further judicial action concerning the competitive relationship between Aloha and HAL will not interfere with the policies and purposes of the Federal Aviation Act as enforced and applied by the CAB.

The courts below took the view that primary jurisdiction was not appropriate here since its only function would be to determine whether HAL's conduct was or was not approved, authorized or required by the CAB. "If so, no damage action lies. If not, the damage action does lie." (R. 69.)

Such a view of primary jurisdiction is far too narrow and limited. As this Court has consistently recognized, decisions concerning parties within the regulated industries (such as Aloha and HAL) involve

> "• • • questions of an exceptional character, the solution of which may call for the exercise of a high degree of expert and technical knowledge. Whether a given agreement among such carriers should be

> held to contravene the act may depend upon a consideration of economic relations, of facts peculiar to the business or its history, of competitive conditions in respect of the shipping of foreign countries, and of other relevant circumstances, generally unfamiliar to a judicial tribunal, but well understood by an administrative body especially trained and experienced in the intricate and technical facts and usages of the shipping trade, and with which that body, consequently, is better able to deal. Compare Chicago Board of Trade v. United States, 246 U.S. 231, 238".
>
> *Far East Conference v. United States,* 342 U.S. 570 (1952) at pp. 573-574.

More recently, in *Ricci v. Chicago Mercantile Exchange,* supra, this Court ruled that administrative remedies must be utilized and the expertise of the relevant board must be exercised before a court can intelligently resolve the claims presented. Any other approach would maximize the danger of an antitrust court making a decision which would frustrate the regulatory policies entrusted to administrative enforcement.

The CAB is authorized to appraise Sherman Act claims, such as those presented by Aloha in this case, in the context of an enforcement proceeding. Indeed, in its unfair competition complaint Aloha alleged that HAL's conduct was in violation of Section 2 of the Sherman Act. The CAB has not yet been given an opportunity to resolve this issue.

As already shown, the CAB has recognized the delicate competitive relationship between these two airlines and the need for extraordinary measures to maintain safe and efficient competitive air transportation service to the

intra-Hawaiian market. These considerations necessitate that the Court below defer to the judgment of the CAB with respect to the present dispute.

CONCLUSION

For the reasons presented above, this Court should grant HAL's petition for Writ of Certiorari.

Dated, April 19, 1974.

Respectfully submitted,

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(Appendices Follow)

Appendix A

United States District Court,

D. Hawaii.

Civ. A. No. 72-3594.

Aloha Airlines, Inc., Plaintiff,

v.

Hawaiian Airlines, Inc.,

Defendant.

Oct. 11, 1972.

SAMUEL P. KING, District Judge.

Plaintiff Aloha Airlines, Inc. (Aloha) and defendant Hawaiian Airlines, Inc. (HAL) are both air carriers incorporated in the State of Hawaii. By virtue of certificates of public convenience and necessity issued to them by the Civil Aeronautics Board (CAB), they provide nearly all air transportation of persons, property and mail among the several islands of the State of Hawaii.

In the original complaint of July 3, 1972, plaintiff alleged that defendant beginning as early as 1968 engaged in an attempt to monopolize this inter-island air transportation system in violation of §2 of the Sherman Act (15 U.S.C. §2). Plaintiff listed seven acts which defendant allegedly undertook "with the predatory intent and purpose of eliminating plaintiff as a viable competitor" (¶ 11

of the Complaint) and "with full knowledge of its impact on plaintiff and with the intent of injuring or destroying plaintiff" (¶ 12 of the Complaint). These are: (1) excessive (vis-a-vis the needs of the public) flight schedules; (2) excessive purchasing, ordering, leasing (or agreeing to lease) of aircraft; (3) misrepresenting its schedule to the public, (4) providing below cost servicing to interstate air carriers between stops; (5 & 6) publicizing the fact that plaintiff and defendant should merge, while twice in bad faith renouncing merger agreements into which defendant had entered; and (7) opposing before the CAB plaintiff's request for a subsidy. As a result of these alleged practices, plaintiff claims it was damaged in the amount of $7,700,000 and prays for treble damages under Section 4 of the Clayton Act (15 U.S.C. § 15).

Pursuant to F.R.Civ.P. 12(c), defendant now moves for an order dismissing plaintiff's complaint on the grounds that (1) it fails to state a claim upon which relief can be granted and/or (2) this court lacks jurisdiction over the subject matter and parties. Alternatively, on the same basis, defendant moves under F.R.Civ.P. 56 for an order of summary judgment as to all the claims alleged in the complaint. If neither of the above are granted, the defendant then requests that certain allegations in the complaint be stricken pursuant to F.R.Civ.P. 12(f).

Defendant's motions are based on four alternative contentions. First, the CAB has exclusive jurisdiction over the subject matter of this action. Second, the CAB has primary jurisdiction and this Court should await further proceedings by the Board. Third, plaintiff's complaint fails to allege the necessary elements for an attempt to

monopolize which is prohibited by § 2 of the Sherman Act. Fourth, Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961) forbids any antitrust claim based on defendant's opposition to Aloha's subsidy request before the CAB.

This Court finds none of these arguments convincing.

Exclusive Jurisdiction of the CAB

Relying on Pan American World Airways, Inc. v. United States, 371 U.S. 296, 83 S.Ct. 476, 9 L.Ed.2d 325 (1963) (*Pan Am.*), HAL argues that all seven acts alleged in the complaint are within the exclusive authority of the CAB and therefore this Court is precluded from exercising its normal antitrust jurisdiction. HAL contends that its position is supported by the Board's past participation in the disputes between the parties. A brief background history of this dispute follows.

On Sept. 16, 1968, Aloha filed before the CAB a petition for subsidy award under 49 U.S.C. §1376(b)(3), requesting that it be given an annual award of $1,784,784. This request was based on substantial recent losses by Aloha which it contended were in part caused by HAL's scheduling policy. On May 16, 1972, the CAB awarded Aloha a subsidy of $789,000 for losses sustained from Sept. 16, 1968 through Feb. 29, 1969, specifically finding that Aloha's losses during this period were attributable to the uneconomic competition of HAL. Concerning Aloha's subsequent losses, the Board concluded that Aloha failed to satisfy the two requirements of § 1376(b)(3), i.e., (1) that its own management was neither "honest, economical nor

efficient" and (2) that the operations for which the subsidy was requested were not in the public interest. Therefore, the remainder of Aloha's request was denied. On June 27, 1972, Aloha filed a Petition for Reconsideration before the Board.

In addition to the above Aloha filed on Nov. 12, 1969, a complaint against HAL alleging a violation of 49 U.S.C. § 1381 due to the latter's scheduling practices. On Dec. 12, 1969, HAL filed a complaint against Aloha based on the same allegations. After a CAB hearing examiner recommended approval of a proposed merger between the two parties, both complaints were dismissed, only to be reactivated on May 10, 1971 because the merger plans failed to materialize. Finally, on July 16, 1971, the parties reached an agreement regarding their scheduling practices for a period running from July 15, 1971 to July 15, 1973, the Board giving its approval and retaining jurisdiction as required under 49 U.S.C. § 1382. The overscheduling complaints were then dismissed again.

As Chief Judge Lumbard stated in Trans World Airlines, Inc. v. Hughes, 332 F.2d 602 at 606 (2nd Circuit 1964) (TWA), to be decided by the Supreme Court this term, 405 U.S. 915, 92 S.Ct. 960, 30 L.Ed.2d 785:

> "The proposition has so often been stated that it has become hornbook law that immunity from the operation of the antitrust laws is not lightly to be inferred from the enactment of a regulatory statute, see Georgia v. Pennsylvania R. Co., 324 U.S. 439, 65 S.Ct. 716, 89 L.Ed. 1051."

Justice Douglas in *Pan Am* echoed the same idea, specifically referring to the Aeronautics Act:

"No mention is made of the Department of Justice and its role in the enforcement of the antitrust laws, yet we hesitate here as in comparable situations, to hold that the new regulatory scheme adopted in 1938 was designed completely to displace the antitrust laws—absent an unequivocally declared congressional purpose so to do. While the Board is empowered to deal with numerous aspects of what are normally thought of as antitrust problems, those expressly entrusted to it encompass only a fraction of the total. Apart from orders which give immunity from the antitrust laws by reason of § 414, the whole criminal law enforcement problem remains unaffected by the Act. Cf. United States v. Pacific & Arctic Railway & Navigation Co., 228 U.S. 87, 105, 33 S.Ct. 443, 57 L.Ed. 742. Moreover, on the civil side violations of antitrust laws other than those enumerated in the Act might be imagined. We, therefore, refuse to hold that there are no antitrust violations left to the Department of Justice to enforce." 371 U.S. 296 at 304-305, 83 S.Ct. 476 at 482.

This general principle is further reflected in the Act's own saving clause, 49 U.S.C. § 1506, which states:

"Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."

This Court believes that HAL's reliance on *Pan Am* as applied to the facts in this case is misplaced.

Pan Am held that in an injunctive action by the Justice Department, disputes involving certain specific matters (division of territories, allocation of routes and combinations between common carriers and air carriers) are

within the CAB's exclusive jurisdiction. In *Pan Am*, money damages were not sought. Indeed it is impossible for the CAB to award damages under the Act.[1] Therefore, while Aloha could have brought an action under § 1381 based on HAL's overscheduling (similar to its earlier action of Nov. 12, 1969), its sole relief against HAL would be completely prospective.[2] It would not obtain from the CAB the treble damage remedy for which it prays in this complaint.

The validity and applicability of the following statement in S.S.W., Inc. v. Air Transport Assoc. of America, 89 U.S.App.D.C. 273, 191 F.2d 658 at 663 (1952) has not been changed by the subsequent *Pan Am* decision:

> "The prayer for treble damages under the antitrust laws raises a different problem. The Civil Aeronautics Act, unlike the Interstate Commerce Act and the Shipping Act, does not authorize the award of damages by the Board for violation of its provisions. Where specific damage provisions are contained in regulatory statutes, it has been held that there may be no recovery of treble damages under the antitrust laws. And this even in a statute such as the Interstate Commerce Act which contains a clause saving

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[1]HAL argues that the subsidy award was the equivalent to damages and should be so regarded. This ignores the procedure under which the subsidy is given and the requirements which must be satisfied under 49 U.S.C. § 1376(b)(3). In short, plaintiff's ability to recover in an antitrust claim, and the extent of that recovery, involve different questions than those considered in a subsidy award under § 1376(b)(3).

[2]It should be noted that the parties' agreement of July 16, 1971 regarding their scheduling difficulties, and the CAB's subsequent approval of it under § 1382, precludes any antitrust claim based on HAL's past July 15, 1971 scheduling which was in conformity with that agreement. See 49 U.S.C. § 1384. Aloha's complaint, however, recognizes this fact when it admits that HAL's alleged overscheduling lasted only "until late 1970".

all preexisting remedies at common law or by statute. Here, however, we have both a saving clause, which provides that 'Nothing contained in this Act shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies' and a statute which conspicuously makes no provisions for damages. Reading the saving clause in the light of congressional failure to provide a remedy for damages in the Civil Aeronautics Act, we conclude that Congress did not intend to deprive an air carrier of its right to seek treble damages for violations of the antitrust laws. This accords with the Supreme Court's determination that it could grant injunctive relief under the antitrust laws against a combination of railroads under circumstances where the Interstate Commerce Commission was not authorized to grant comparable relief."

See also, *TWA, supra,* 332 F.2d at 609; and *Pan Am, supra,* 371 U.S. at 310-311 and 321, 83 S.Ct. at 476.

Moreover, the seven acts alleged in plaintiff's complaint are clearly distinguishable from the acts involved in the *Pan Am* case; none can be considered basic to the regulatory scheme of the Act. See, *e.g., TWA, supra,* 332 F.2d at 608-609. Indeed, the CAB is specifically forbidden to regulate scheduling, under 49 U.S.C. § 1371(e)(4). In this regard, this Court rejects HAL's argument that because a CAB approved merger under 49 U.S.C. § 1378 is expressly immune from antitrust attack under § 1384, any acts preceding that merger cannot be the basis of an antitrust suit. See, *e.g., TWA, supra* at 610 (its analysis regarding post-merger acts is just as applicable to pre-merger ones). Moreover, we have no merger in this case;

§ 1384 is not activated and there are no policy reasons for allowing HAL to negotiate for a merger, as Aloha contends, in bad faith. This Court is not saying that Aloha's allegations in this regard are true, but only that they are sufficient, if true, to state a cause of action.

Primary Jurisdiction of the CAB

As already mentioned, the CAB has no power to award damages for past unfair competitive practices; it is limited under § 1381 to issuing cease and desist orders against prospective conduct only. However, Aloha's contentions are based on past conduct by HAL, especially overscheduling, which plaintiff admits is no longer a problem. Moreover, the standards and issues involved in awarding a subsidy under § 1376(b)(3) are different from those involved in awarding damages in an antitrust case. Therefore, this Court cannot, and should not, apply the doctrine of primary jurisdiction. See Allied Air Freight, Inc. v. Pan American World Airways, Inc., 393 F.2d 441 (2nd Circuit, 1968).

Plaintiff's Complaint Fails to State a Cause of Action

On its face, Aloha's complaint is adequate. See Walker Distributing Co. v. Lucky Lager Brewing Co., 323 F.2d 1 (9th Circuit, 1963).

Noerr Issue

Although most of HAL's contentions in its motion to strike have already been rejected, nothing has yet been said of its argument that ¶ 11(g) of Aloha's complaint, relating to HAL's alleged opposition to Aloha's subsidy

request before the CAB, should be stricken because HAL's conduct before the CAB is immune from an antitrust action, citing the *Noerr* case, *supra.*

Aloha's allegations fall within the *Noerr* "sham" exception as interpreted most recently in California Motor Transport v. Trucking Unlimited, 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972). If plaintiff can prove that HAL opposed its subsidy with "the predatory intent and purpose of eliminating plaintiff as a viable competitor" (¶ 11 of the Complaint) and "with full knowledge of its impact on plaintiff and with the intent of injuring or destroying plaintiff" (¶ 12 of the Complaint), then the *Noerr* protections do not apply.

Summary Judgment

Summary judgment is not appropriate on the present state of the record.

Conclusion

For the reasons stated above, defendant's motions will be denied. An appropriate order to that effect will be signed upon presentation by either counsel through opposing counsel.

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United States District Court,
D. Hawaii.

Civ. No. 72-3594.

Aloha Airlines, Inc., Plaintiff and
Counterdefendant,

v.

Hawaiian Airlines, Inc., Defendant
and Counterclaimant.

Feb. 16, 1973

DECISION and ORDERS

SAMUEL P. KING, District Judge.

Motion to add a national bank as a party defendant

Plaintiff (hereinafter Aloha) has moved (1) to add "Chase Manhattan Bank" as a party defendant and (2) to file a second amended complaint.[1] Defendant (hereinafter Hawaiian) does not object to the filing of the second amended complaint but does object to the addition of "Chase Manhattan Bank" as a party defendant.

Counsel for The Chase Manhattan Bank, N.A. (hereinafter Chase)[2], have advised court and counsel by letter[3]

[1]The second amended complaint adds a claim under Section 1 of the Sherman Act (alleging a combination or conspiracy between Hawaiian and Chase) and under Hawaii Revised Statutes Sections 480-2 and 9. The original complaint alleged offenses only under Section 2 of the Sherman Act.

[2]Chase's official name is "The Chase Manhattan Bank, N.A."

[3]Andrew J. Connick, Esq., of Milbank, Tweed, Hadley & McCloy, by letter dated February 1, 1973, set forth Chase's position in this regard. Under the circumstances, no purpose would be served to insist upon a more formal pleading.

that, while they acknowledge that Chase does not have any clear right to be heard on the motion as it affects Chase, if the motion is granted, Chase will move for dismissal on the grounds, among others, that venue is improper under 12 U.S.C. § 94.[4] For purposes of this motion, the parties have agreed that the court may take judicial notice that Chase is a national bank whose principal place of business is New York City.

Aloha suggests that the relationship between venue under 12 U.S.C. § 94 and venue under 15 U.S.C. §§ 15 and 22[5] has not yet been clarified, and cites Levin v. Great W. Sugar Co., 274 F.Supp. 974 (D.N.J.1967) (hereinafter *Levin*) for the proposition that a specific venue statute[6]

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[4]"§ 94. Venue of suits. Actions and proceedings against any association under this chapter may be had in any district or Territorial court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases." Enacted June 3, 1864. See also 28 U.S.C. § 1348, providing that national banking associations shall be deemed to be citizens of the States in which they are respectively "located".

[5]"§ 15. Suits by persons injured; amount of recovery. Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." Enacted October 15, 1914.

"§ 22. District in which to sue corporation. Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found." Enacted October 15, 1914.

[6]15 U.S.C. § 78aa, enacted June 6, 1934, relating to suits violative of the Securities Exchange Act of 1934, and specifically providing for venue "in the district wherein any act or transaction constituting the violation occurred" or "in the district wherein the

may be interpreted as having impliedly amended 12 U.S.C. § 94 for the special purposes of such statute.[7] Whatever the rule may be in the Third Circuit, the Ninth Circuit has taken the opposite view with respect to the same statute considered in *Levin*. United States National Bank v. Hill, 434 F.2d 1019 (9th Circuit 1970) (hereinafter *Hill*).[8] Thus, it is likely that Chase would prevail on this question of venue.

Aloha points out that venue may be waived, submits that Aloha is entitled to have the claim of improper venue asserted and briefed, and argues that policy considerations in the antitrust field should lead to a different result from *Hill*. These do not appear to me to be reasonable expectations under the circumstances.

Hawaiian, while not attempting to represent Chase, embraces the probability of improper venue as further sup-

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defendant is found or is an inhabitant or transacts business," and that "process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found."

[7]The *Levin* court cited an earlier case which had reached the opposite conclusion, but decided not to follow that case, although acknowledging that the general venue statute, 28 U.S.C. § 1391, did not repeal 12 U.S.C. § 94.

[8]The court had before it claims of venue under both 15 U.S.C. § 78aa (of the Securities Exchange Act of 1934) and 15 U.S.C. § 77v (of the Securities Act of 1933). The provisions of these statutes are quite similar. The court reaffirmed an earlier holding that a national bank is "located" for the purposes of 28 U.S.C. § 1348 only in the state wherein it maintained its principal place of business, even though it has branch offices in other states, and cited a Supreme Court case for the proposition that a national bank can be sued *only* in the district in which it is "established or located". In *Hill* the suit was brought in the Central District of California where the national bank had a branch office, but the national bank's principal place of business was in the Southern District of California. The court granted a writ of mandamus requiring transfer of the entire case to the Southern District or dismissal of the national bank as a defendant. See also Helco, Inc. v. First National City Bank, 470 F.2d 883 (3rd Circuit 1972).

port for the argument that the addition of Chase as a party defendant at this time would unduly and unnecessarily delay and confuse the proceedings to Hawaiian's prejudice. I agree.

Aside from the venue complication, there would be the expense and delay involved in discovery by Chase.[9] The allegations involving Chase all include Hawaiian, so that Aloha is not deprived of an issue upon which to go to the jury.[10] On the other hand, Aloha is attempting to associate Chase with all of the offenses and acts charged against Hawaiian, which invites extensive discovery by Chase covering not only ground already gone over in depositions taken by Aloha and Hawaiian to date but also matters taken up in CAB hearings to which both Aloha and Hawaiian were parties but Chase was not.[11] In pre-trial conferences, Aloha made the point that preparation for trial has been expedited by evidence adduced before the CAB, and both parties felt that substantial portions of the CAB record could be stipulated into evidence here. There is also the possibility of the application of the doctrine of collateral estoppel or of *res judicata* to certain factual issues determined by the CAB as between Aloha and Hawaiian, a possibility that does not exist in relation to Chase.[12]

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[9]Not to mention the time required to dispose of predictable counter-pleadings by Chase.

[10]Aloha may proceed with its Sherman Act Section 1 claims naming Chase as a co-wrongdoer if not as a co-defendant. Aloha may also file a separate action against Chase in New York.

[11]Regarding depositions already taken, see Rule 32, F.R.Civ.P.

[12]See Paramount Transport Sys. v. Chauffeurs, etc., Local 436 F.2d 1064 (9th Circuit 1971). I assume that Chase and Hawaiian do not have the same interest and motive in cross-examining witnesses or deponents.

There is a reasonable expectation that this action, without Chase, will be disposed of this coming autumn. With Chase, there is a reasonable expectation that the action would extend well into next year. Some of the argument has indicated that both Aloha and Hawaiian have major financial problems.[13] The sooner this suit is tried the better it will be for both parties.

[1] The motion to add Chase as a party defendant is denied. The motion to file a second amended complaint is granted, except to the extent that the complaint adds Chase as a party defendant.

Motion for reconsideration of alternate motions

Hawaiian has moved for reconsideration of the denial of its alternate motions of August 15, 1972, to dismiss the complaint or for summary judgment.[14]

The motion is based upon recent decisions filed subsequent to my earlier decision.

Hawaiian argues that Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363, 93 S.Ct. 647, 34 L.Ed.2d 577 (1973) (hereinafter *Hughes Tool Co.*),[15] makes it clear that the CAB has exclusive jurisdiction over the matters

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[13]One of Aloha's arguments for adding Chase is that Hawaiian had "admitted it may not have the resources to respond in damages should plaintiff be successful at trial." Aloha's financial difficulties are a matter of public record.

[14]Aloha Airlines, Inc. v. Hawaiian Airlines, Inc., 349 F.Supp. 1064 (D.Hawaii 1972), decision filed October 11, 1972.

[15]Hawaiian contends that *Hughes Tool Co.* is "on all fours" with the pending case in that each case involves allegations of bad faith merger negotiations to the complainant's damages. The suggested comparison does not bear closer analysis.

alleged by Aloha in its second amended complaint;[16] and if not, that the principles enunciated in Ricci v. Chicago Mercantile Exchange, 409 U.S. 289, 93 S.Ct. 573, 34 L.Ed. 2d 525 (1973) (hereinafter *Ricci*)[17] and Laveson v. Trans World Airlines, Inc., 471 F.2d 76 (3rd Circuit 1972) (hereinafter *Laveson*)[18] require a stay of these proceedings

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[16]The CAB's authority over certain matters, and specifically over scheduling is restricted by 49 U.S.C. § 1371(e)(4).

[17]*Ricci* held that an antitrust suit for damages alleging violations of the rules of the Chicago Mercantile Exchange and of the Commodity Exchange Act should be stayed until the Commodity Exchange Commission could pass on the validity of the challenged conduct under the Commodity Exchange Act. Justice White said, in part:

> "... We make no claim that the Commission has authority to decide either the question of immunity as such or that any rule of the Exchange takes precedence over antitrust policies. Rather, we simply recognize that Congress has established a specialized agency that would determine either that a membership rule of the Exchange has been violated or that it has been followed. Either judgment would require determination of facts and the interpretation and application of the Act and exchange rules. And either determination will be of great help to the antitrust court in arriving at the essential accommodation between the antitrust and the regulator regime: The problem disappears entirely if it is found that there has been a violation of the rule; on the other hand, if it is found that the Exchange has merely followed and enforced its own rules, the antitrust court will be in a position to make a more intelligent and sensitive judgment as to whether the antitrust laws will punish what an apparently valid rule of the Exchange permits." (409 U.S. at page 307, 93 S.Ct. at page 583).

[18]*Laveson* held that an antitrust suit against three airlines for damages alleging a conspiracy to fix the price to coach passengers for the rental of headsets used with inflight motion pictures should be stayed pending determination by the CAB whether the alleged agreement was approved and whether the CAB had the power to immunize retroactively pre-approval conduct, on the ground that the issues raised by the suit came within the primary jurisdiction of the CAB, as provided specifically by 49 U.S.C. § 1382. The court stated that the primary jurisdiction doctrine applied to an agreement within the jurisdiction of the CAB even if the agreement had not yet been filed with the board, and even though the plaintiffs in the antitrust action were seeking a remedy (treble damages)

pending a decision by the CAB as to whether Hawaiian's alleged activities constituted unfair or deceptive practices or unfair methods of competition.[19]

On both points, I adhere to my earlier decision.

At that time, Trans World Airlines, Inc. v. Hughes, 332 F.2d 602 (2nd Circuit 1964 (hereinafter *TWA*) was cited for certain propositions. *Hughes Tool Co.* reversed *TWA*. Upon reexamination of my earlier decision, I conclude that the references to *TWA* were not crucial to the result reached.[20]

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that the CAB could not grant. The alleged illegal agreement had in fact been filed with the CAB which had considered and was holding in abeyance certain proposed actions relative thereto.

[19]Aloha did file a complaint with the CAB pursuant to 49 U.S.C. § 1381 against Hawaiian based on Hawaiian's scheduling practices. CAB Docket 21604. Hawaiian countered with a similar complaint against Aloha. CAB Docket 21695. Both "enforcement proceedings" were "dismissed without prejudice" by order adopted December 30, 1971, which also approved a scheduling agreement (agreement CAB 22539 and Amendment 1 thereto), between Aloha and Hawaiian, looking to the future (to July 15, 1973). The order of December 30, 1971, further provides: "4. Pursuant to 49 U.S.C. 1382(b), the Board will retain continuing jurisdiction over this agreement and may modify its approval of, or disapprove the agreement at any time without hearing, or take whatever action may be deemed appropriate."

[20]Firstly, Chief Judge Lumbard was quoted as saying in *TWA:*

> "The proposition has so often been stated that it has become hornbook law that immunity from the operation of the antitrust laws is not lightly to be inferred from the enactment of a regulatory statute. See Georgia v. Pennsylvania R. Co., 324 U.S. 439, [65 S.Ct. 716, 89 L.Ed. 1051]." (332 F.2d at page 606).

Justice Douglas shifts the emphasis but not the result when he says in *Hughes Tool Co.:*

> "We repeat . . . what we said in the *Pan American* case that the Federal Aviation Act does not completely displace the antitrust laws.
>
> " 'While the Board is impowered to deal with numerous aspects of what are normally thought of as antitrust problems, those expressly entrusted to it encompass only a fraction of

Hawaiian reads *Hughes Tool Co.* as holding that all acts that could be the subject of a CAB order are immunized from the operation of the antitrust laws.[21] Aloha reads

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the total.' 371 U.S. [296], at 305 [83 S.Ct. 476, at 482, 9 L.Ed.2d 325].

"One of the most conspicuous exceptions would be the combination or agreement between two air carriers involving trade restraints. See Timken Co. v. United States, 341 U.S. 593, 598 [71 S.Ct. 971, 974, 95 L.Ed. 1199].

"There may be other exceptions. . . ." (409 U.S. at page 387, 93 S.Ct. at page 661).

Secondly, *TWA* was cited, along with Pan American World Airways, Inc. v. U. S., 371 U.S. 296, 83 S.Ct. 476, 9 L.Ed.2d 325 (1963) (hereinafter *Pan Am*), as additional support for a quote from S.S.W., Inc. v. Air Transport Assoc. of America, 86 U.S.App. D.C. 273, 191 F.2d 658 (1952) (hereinafter *SSW*) at page 663, to the effect that Congress did not intend to deprive an air carrier of its right to seek treble damages for violations of the antitrust laws. This quote may have suggested more than it should if it is taken to imply that an action for treble damages would lie for conduct subject to CAB jurisdiction which would have been subject to the operation of the antitrust laws but for CAB approval. It is clear from *Hughes*, and was clear before *Hughes*, that § 414 of the Federal Aviation Act (49 U.S.C. § 1384) immunizes from antitrust liability any conduct approved, authorized, or required by any CAB order under § 408 (49 U.S.C. § 1378), § 409 (49 U.S.C. § 1379,) or § 412 (49 U.S.C. § 1382) of the Act.

Thirdly, *TWA* was cited in support of the proposition that the CAB does not have exclusive jurisdiction because the seven acts alleged by Aloha are not "basic to the regulatory scheme" of the Federal Aviation Act. The quoted phrase orginated in *Pan Am*. Nothing in *Hughes Tool Co.* suggests that this posits an improper test of CAB jurisdiction, although the Supreme Court did disagree with the Circuit Court's application thereof.

Fourthly, *TWA* was cited for the proposition by analogy that acts preceding a CAB-approved merger may be the basis of an antitrust suit for damages. The analysis in *TWA* regarding antitrust liability for post-merger acts was rejected in *Hughes Tool Co.*, and the Supreme Court's reasoning suggests that pre-merger acts may be immunized from antitrust liability by a CAB order. In any event, here there is no CAB-approved merger, no CAB order approving, authorizing, or requiring any of Hawaiian's alleged acts, nor any proceeding in relation thereto pending before the CAB.

[21]Hawaiian renews its argument that because Aloha could have proceeded against Hawaiian before the CAB under 49 U.S.C. § 1382, such a proceeding is Aloha's only remedy. But see *Ricci* and *Laveson* and the discussion below.

Hughes Tool Co. as holding that only acts which have been approved, authorized or required by a valid CAB order are so immunized.[22]

[2] I agree with Aloha's interpretation of the case.

In discussing the CAB's involvement in the challenged transactions, Justice Douglas said:

> "One difficulty with the conclusion of the Court of Appeals [in *TWA*] that these transactions, unlike those involved in the *Pan American* case, were transactions on which the Board might take action but did not do so is that it misconstrues the record." *Hughes Tool Co.*, 409 U.S. at page 379, 93 S.Ct. at page 657.
>
> "It is too clear for argument that in entering the 1950 order the Board fully realized that Toolco had determined and would determine when and how much new equipment would be purchased, from whom it would be acquired and how it would be financed. It was precisely this type of association that it contemplated when it approved the additional control obtained by Toolco in 1947. And it was precisely this same conclusion that the Board was implementing each time during the 1950's that it approved a sale or lease of an airplane from Toolco to TWA which, without its approval, would have violated the Board's ongoing limitation on the size of inter-company transactions." *Hughes Tool Co.*, 409 U.S. at page 386, 93 S.Ct. at page 660.

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[22] *Hughes Tool Co.* and *Laveson* give a CAB order both retrospective and prospective effect. A CAB order approving, authorizing, or requiring certain conduct necessarily includes some prior acts associated with such conduct, and not only future acts consistent with the order.

There is no claim here that any of Hawaiian's acts of which Aloha complains were done pursuant to a valid CAB order.[23]

[3] In my earlier decision, I held that this court cannot and should not apply the doctrine of primary jurisdiction to stay these proceedings pending CAB action. I do not read *Hughes, Ricci,* or *Laveson* as requiring a different result.

[4] I understand *Ricci* and *Laveson* as holding that an antitrust action for treble damages based on conduct which could be approved, authorized, or required by the valid order of an administrative agency should be stayed pending a decision by that agency as to whether the conduct in question is or is not approved, authorized, or required.[24] If so, no damage action lies.[25] If not, the damage action does lie.[26]

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[23]Aloha contends that "the CAB has already held that Hawaiian's over-scheduling was the sole cause of Aloha's inability to attain a load factor of 55.1% in the period indicated and that as a result of that conduct Aloha lost substantial revenues." Motion for Partial Summary Judgment under Rule 56 or, in the Alternative, for a Pre-Trial Order Under Rule 16, filed January 24, 1973.

[24]See footnotes 17, 18, 20, and 22, *supra.*

[25]The validity and scope of the order are subject to court review. See *Ricci.*

[26]By order adopted February 7, 1973, the CAB entered its Supplemental Opinion on Reconsideration and Order Denying Motion, saying in part:

> "Finally, the Board is cognizant of the antitrust suit which has been filed by Aloha against Hawaiian in . . . Hawaii . . . We believe it appropriate to include a provision in the rate whereby Aloha's subsidy award will be reduced by the amount of any recovery in the litigation, or in a settlement thereof, to

Here the acts by Hawaiian of which Aloha complains could not now be approved, authorized, or required by the CAB.[27] There is therefore nothing to refer to the CAB.[28]

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the extent that such recovery relates to damages sustained during the 5½-month subsidy period . . ."

The Board noted specifically that it was not expressing any view concerning the merits of Aloha's complaint.

The subsidy period is September 16, 1968 through February 28, 1969.

The period during which the offenses set forth in the complaint are alleged to have taken place is "Beginning as early as 1968 and continuing to the date of the filing of this Complaint [July 3, 1972]" except for the alleged "predatory, excessive scheduling" which continued until the CAB-approved scheduling agreement of December 8, 1970.

[27]The proposed second amended complaint details these acts and their effects as follows:

"IV: OFFENSES CHARGED

11. Beginning at least as early as 1968 and continuing up to the date of the filing of this Complaint, defendant HAWAIIAN, acting in concert with defendant CHASE, has been engaged in a plan, program, and attempt to restrain and to monopolize trade and commerce in inter-island air transportation in the State of Hawaii in violation of Sections 1 and 2 of the Sherman Act (15 U.S.C. 1, 2) and Sections 480-2 and 9 of the Hawaii Revised Statutes.

12. The aforesaid plan, program and attempt to monopolize consisted of the following acts, all undertaken with the predatory intent and purpose of eliminating as a viable competitor:

(a) Defendant HAWAIIAN, acting in active concert with defendant CHASE, scheduled excessive flights over and beyond the actual and anticipated needs and requirements of the public.

(i) In August, 1966, ALOHA scheduled 399 weekly flights on the four major route segments while HAWAIIAN had only 339; by August, 1968, HAWAIIAN increased the number of its scheduled flights to 486 while ALOHA actually reduced the number of its flights to 368; using 1966 as a base of 100, ALOHA's frequency of scheduled weekly flights on the four major route segments decreased in 1968 to 92, while HAWAIIAN's increased to 143; by 1969, HAWAIIAN's frequency had increased to 189% of the 1966 level, while ALOHA's had increased to 123% of the 1966 level.

(ii) During the period 1966-1968, ALOHA's passenger load factor declined from 59.5% to 44.7%.

(iii) The foresaid predatory, excessive scheduling continued until late 1970, when, at the urging and under the auspices

The motion for reconsideration is denied.

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of the Civil Aeronautics Board, HAWAIIAN and ALOHA reached agreement on flight schedules pursuant to which each company secured a share of the passenger market closely related to each company's historic position.

(b) Defendant HAWAIIAN, with the active participation of defendant CHASE, and with its advice, permission and consent, purchased, ordered, leased or agreed to lease an excessive number of aircraft;

(c) Defendant HAWAIIAN misrepresented its schedule to the public in order to induce members of the public to obtain discount flights;

(d) Defendant HAWAIIAN attempted to undercut and provide services below cost to interstate air carriers in the area of servicing aircraft between stops;

(e) Defendant HAWAIIAN has repeatedly publicized the fact that the two airlines should merge, with HAWAIIAN being in control, thereby undermining the confidence of the public, the travel industry, stockholders, creditors and employees of plaintiff;

[28]See note 28 on page 436.

Appendix B

United States Court of Appeals,
Ninth Circuit.

No. 73-1557.

Aloha Airlines, Inc., Plaintiff-Appellee,

v.

Hawaiian Airlines, Inc.,
Defendant-Appellant.

Nov. 29, 1973.

Before TUTTLE,* HUFSTEDLER and KILKENNY, Circuit Judges.

TUTTLE, Circuit Judge:

This appeal from an interlocutory order denying the defendant-appellant's motion to dismiss D.C., 349 F.Supp. 1064, is here by order of this court allowing interlocutory appeal under 28 U.S.C.A. § 1292(b).

The issue is a narrow one, but one that is important and timely for interlocutory consideration because of the decision of the Supreme Court in Hughes Tool Company

*Of the Fifth Circuit, sitting by designation pursuant to 28 U.S.C. § 294(d) (1970).

v. Trans World Airlines, Inc., 409 U.S. 363, 93 S.Ct. 647, 34 L.Ed.2d 577 (1973).

The significance of the *Hughes* case here is plain when we note that this, like *Hughes,* is a case of alleged antitrust violations of section 2 of the Sherman Act, 15 U.S. C.A. § 2, which alleged violations had previously been the subject of certain proceedings before the Civil Aeronautics Board. In *Hughes* the Court, reversing the decision of the Court of Appeals for the Second Circuit, 332 F.2d 602 (2d Cir. 1964), held that the principal acts alleged as the grounds of an antitrust suit had all been the subject of express orders approving them, previously entered by the CAB in the proper exercise of its statutory duties, and that, therefore, all of these acts, as well as other conduct which "was no more than the kind of conduct the CAB . . . had approved" were immunized from antitrust laws. We must, therefore, determine whether the acts of HAL which Aloha alleged as the basis of its antitrust suit and the actions of the CAB relative to them here fit the pattern of those found by the Court in *Hughes* to immunize them from the antitrust laws.

The following undisputed history of the case is taken largely from the decision of the trial court, preliminary to its order denying HAL's motion to dismiss:

Aloha and defendant HAL are both air carriers incorporated in the State of Hawaii. By virtue of certificates of public convenience and necessity issued to them by the Civil Aeronautics Board, they provide nearly all air transportation of persons, property and mail among the several islands of the State of Hawaii.

In the original complaint of July 3, 1972, plaintiff alleged that defendant, beginning as early as 1968 and continuing through 1970, engaged in an attempt to monopolize this inter-island air transportation system in violation of section 2 of the Sherman Act, 15 U.S.C.A. § 2. Plaintiff listed seven acts which defendant allegedly undertook "with the predatory intent and purpose of eliminating plaintiff as a viable competitor" and with full knowledge of its impact on plaintiff and with the intent of injuring or destroying plaintiff." These are: (1) excessive (vis-a-vis the needs of the public) flight schedules; (2) excessive purchasing, ordering, leasing (or agreeing to lease) of aircraft; (3) misrepresenting its schedules to the public; (4) providing below cost servicing to interstate air carriers between stops; (5 & 6) publicizing the fact that plaintiff and defendant should merge, while twice in bad faith renouncing merger agreements into which defendant had entered; and (7) opposing before the CAB plaintiff's request for a subsidy. As a result of these alleged practices, plaintiff claims it was damaged in the amount of $7,700,000 and prays for treble damages under section 4 of the Clayton Act, 15 U.S.C.A. § 15.

Pursuant to Fed.R.Civ.P. 12(c), defendant moved for an order dismissing plaintiff's complaint on the grounds that (1) it fails to state a claim upon which relief can be granted and/or (2) the trial court lacked jurisdiction over the subject matter and parties. Alternatively, on the same basis, defendant moved under Fed.R.Civ.P. 56 for an order of summary judgment as to all the claims alleged in the complaint.

Defendant's motions were based on four contentions. First, the CAB has exclusive jurisdiction over the sub-

ject matter of this action. Second, the CAB has primary jurisdiction and the Court should await further proceedings by the Board. Third, plaintiff's complaint fails to allege the necessary elements for an attempt to monopolize which is prohibited by section 2 of the Sherman Act. Fourth, Eastern Railroad Conference v. Noerr Motor Freight, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961) forbids any antitrust claim based on defendant's opposition to Aloha's subsidy request before the CAB.

The trial court found none of HAL's arguments convincing and denied the motion to dismiss. Subsequently, the Supreme Court decided the *Hughes* case, and HAL renewed its motions, which were again denied. This Court granted interlocutory appeal. We affirm.

The position of HAL urged upon the trial court is essentially that all of the actions alleged in the complaint deal with problems that are within the exclusive authority of the CAB, and, therefore, the trial court was precluded from exercising its normal antitrust jurisdiction. In effect, the argument runs that since section 411 of the Federal Aviation Act, 49 U.S.C.A. § 1381,[1] gives to the CAB power and authority to investigate 'unfair or deceptive practices or *unfair methods of competition* in air trans-

[1]"The Board may, upon its own initiative or upon complaint by any air carrier, foreign air carrier, or ticket agent, if it considers that such action by it would be in the interest of the public, investigate and determine whether any air carrier, foreign air carrier, or ticket agent has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof. If the Board shall find, after notice and hearing, that such air carrier, foreign air carrier, or ticket agent is engaged in such unfair or deceptive practices or unfair methods of competition, it shall order such air carrier, foreign air carrier, or ticket agent to cease and desist from such practices or methods of competition. Pub.L. 85-726, Title IV, § 411, Aug. 23, 1958, 72 Stat."

portation," (Emphasis added) this is an explicit commitment to the CAB of sole jurisdiction to deal with any such acts as may be charged to air carriers. They, of course, point to no provision of the statute which expressly immunizes such conduct from charges of Sherman Act violation.

To the contrary, there is a section of the Act, section 414, 49 U.S.C.A. § 1384[2] which does immunize certain actions *authorized, approved* or *required* by other sections of the Act from the antitrust laws.

There is nothing in the *Hughes* opinion that modifies the established rule enunciated in the *Hughes* case when decided in the Court of Appeals that:

> "The proposition has so often been stated that it has become hornbook law that immunity from the operation of the antitrust laws is not lightly to be inferred from the enactment of a regulatory statute, see Georgia v. Pennsylvania R. Co., 324 U.S. 439 [65 S.Ct. 716, 89 L.Ed. 1051]." 332 F.2d 602, 606.

In fact the author of the Court's opinion in *Hughes* while writing for the Court earlier, stressed the fact that only those matters "normally thought of as antitrust *problems*" (Emphasis added) that are "expressly entrusted to the CAB are withdrawn from consideration by the Courts." See Pan American World Airways, Inc. v.

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[2]"Any person affected by any order made under sections 1378, 1379, or 1382 of this title shall be, and is hereby, relieved from the operations of the 'antitrust laws' as designated in section 12 of Title 15, and of all other restraints or prohibitions made by, or imposed under, authority of law, insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order. Pub.L. 85-726, Title IV, § 414, Aug. 23, 1958, 72 Stat. 770."

United States, 371 U.S. 296 at 304, 305, 83 S.Ct. 476, 9 L.Ed.2d 325 (1963).

The jurisprudence, therefore, seems to have been, prior to the Court's decision in *Hughes,* that in those areas of air carrier operations as to which the CAB was given autonomy to issue *orders* dealing with the certification, supervision of tariffs, mergers, borrowings, and interlocking interests of air carriers, the CAB had exclusive jurisdiction to the extent that the courts would not second guess what the Board in its expertise had authorized by order. For example, if the CAB granted a certificate to carrier A for service between two terminal points, a competing carrier could not bring an antitrust charge against carrier A that the mere granting of the certificate and the competition flowing from it was in violation of the antitrust laws, no matter how the new carrier was motivated or how destructive its competition. Such conduct was immunized from "antitrust" action by section 414, *supra,* 49 U.S.C.A. § 1384.

Moreover, the Supreme Court had held that the Board's jurisdiction under section 411 to investigate and put an end to unfair practices alleged to have resulted from orders lawfully entered under authority of sections 408 and 409 gave the CAB exclusive jurisdiction to put a stop to such conduct. The Court said in Pan American World Airways v. United States, 371 U.S. 296, 83 S.Ct. 476, 9 L.Ed.2d 325:

> "It seems to us, therefore, that the Act leaves to the Board under § 411 all questions of *injunctive relief* against the division of territories or the allocation of routes or against combinations between common carriers and air carriers." (footnote omit-

ted) (Emphasis added). 371 U.S. at 310, 83 S.Ct. at 485.

In the Hughes case, Trans World Airlines had filed an antitrust suit against Hughes Tool Company. A default judgment of $145,000,000 with 7½% interest was affirmed by the Court of Appeals for the Second Circuit. 449 F.2d 51 (1971). As stated by the Court in its opinion "The crux of TWA's complaint was the use by Toolco of its control over TWA to control and dictate the manner and method by which TWA acquired aircraft and the necessary financing thereof." 409 U.S. 366, 93 S.Ct. 650.

The Court then stated the issue:

"Another defense of Toolco was that those transactions were under the control and surveillance of the Civil Aeronautics Board and by virtue of the Federal Aviation Act of 1958 these transactions have immunity from the antitrust laws.

"It is our view that the Court of Appeals erroneously rejected that defense. This result, we think, is required by sections 408 and 414 of the Federal Aviation Act and by our prior decision in Pan American World Airways v. United States, 371 U.S. 296 [83 S.Ct. 476, 9 L.Ed.2d 325] (1963)."

The Court's opinion then recited the facts that had occurred during the period 1944-1960: Toolco had by 1944 obtained practical control of TWA by acquiring 45 6/10% of the outstanding stock of the airline; it had obtained subsequent authorizations, including Board approval of the acquisition of up to 80% of the TWA stock by Toolco in 1950. During this time many purchases and

financial arrangements were expressly authorized by the Board under section 408. The Court stressed the fact that each of these Board orders was subject to the requirement contained in the original order of the Board that specific orders of the Board would be required with respect to each transaction dealing with the acquisition of additional aircraft and the financing thereof. Following the placing by Toolco of the stock in a voting trust in 1950, at the insistence of the financial institutions involved in the program, TWA, now no longer under the control of Toolco, filed suit against the latter alleging violations of the antitrust laws, which violations the Supreme Court describes as follows:

> "As analyzed by the Court of Appeals in its opinions filed in this case, the complaint rested principally on Toolco's conduct as controlling stockholder during the years 1955-1960 . . .
>
> "As respects its defense that CAB control and surveillance gave it immunity from the antitrust suit, Toolco relies on Pan American World Airways v. United States, 371 U.S. 296 [83 S.Ct. 476, 9 L.Ed.2d 325]. The Court of Appeals distinguished that case, saying that there the unlawful division of territories and allocation of routes were directly 'within the ambit of powers explicitly granted the Board by the Congress,' 332 F.2d at 608. The Court of Appeals said that the present case was different because, in its view, the continuing supervision of the Board over to Toolco-TWA relationship was general and not related to a specific conduct that gave rise to violations of the antitrust laws." *Id.* at 372-378, 93 S.Ct. at 656.

The Court then made it plain that the facts in *Hughes* were not to be distinguished from those in *Pan American*

so far as their being matters that were explicitly committed to the CAB was concerned. The Court said:

> "One difficulty with the conclusion of the Court of Appeals that these transactions, unlike those involved in the *Pan American* case, were transactions on which the Board might take action but did not do so, is that it misconstrues the record. As noted, from 1944 through 1960 every acquisition or lease of aircraft by TWA from Toolco and each financing of TWA by Toolco required Board approval. Each transaction was approved by the Board and each approval was an order under section 408, for the Board regarded its transactional orders as modifications or interpretations of its antecedent control order. Each of the modification orders recited the finding of the Board that the transactions were 'just and reasonable and in the public interest.' " *Id.* at 379, 93 S.Ct. at 657.

The Court then for the second time stated that the Federal Aviation Act does not completely displace the antitrust laws. The Court said "We by no means hold that the Federal Aviation Act completely displaces the antitrust laws. Pan American, 371 U.S. at 305 [83 S.Ct. 476]." The Court then, it seems to us made clear the thrust of its holdings as to the extent to which the antitrust laws were displaced in the circumstances of that case.

> "But where, as here, the CAB authorizes control of an air carrier to be acquired by another person or corporation, and where the CAB specifically authorizes as in the public interest specific transactions between the parent and the subsidiary, the way in which that control is exercised in those precise situations is under

the surveillance of CAB, not in the hands of those who can invoke the sanctions of the antitrust laws. As noted, the parent company which controls an air carrier is subject to pervasive control by the CAB. The control which CAB is authorized to grant or to deny under § 408 involves an appraisal of the impact of that control in terms of monopoly and competition; and the ongoing supervision entrusted to the CAB by § 415 is broad enough to put all transactions between parent and subsidiary—as originally conceived or subsequently exercised—under CAB supervision." *Id.* at 387-388, 93 S.Ct. at 662.

In the case before us there is no order of the CAB authorizing the conduct which has been made the basis of the antitrust complaint filed by Aloha. HAL takes the position, however, that the fact that section 411 of the Act provides that the Board may, upon its own initiative or upon complaint by any air carrier, investigate and determine whether any air carrier has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation and if it should find the existence of such practices, it shall issue a cease and desist order amounts to an explicit commitment of exclusive authority to the Board to deal in all aspects with charges of unfair competition.

To be sure, *Pan American* held that the CAB had exclusive jurisdiction to halt certain alleged anticompetitive practices, but the alleged practices in that case had been the subject of specific orders of the CAB dealing with "the division of territories or the allocation of routes or . . . combinations between common carriers and air car-

riers''—all matters within the Board's primary jurisdiction under section 408 or section 409. In contrast, the CAB has not issued any orders authorizing or restraining HAL's past conduct of which Aloha complains.

The Court made it plain in *Pan American* that such jurisdiction was restricted to prospective relief since the Court said "[t]he Board has no power to award damages or to bring criminal prosecutions." This was noted at the point in which the Court was recognizing limitation on the kinds of relief that were committed to the Board. The dissenting opinion by Mr. Justice Brennan was based largely upon the distinction made by the Court between the granting of exclusive jurisdiction to the Board as to injunctive matters while leaving to the antitrust court the handling of damage claims.

We conclude, therefore, that the grant of authority to the Board by section 411 does not withdraw from the antitrust litigants the right to proceed for damages alleged to have occurred by reason of antitrust violations of the kind with which the Board has authority to deal only by issuing a cease and desist order.

HAL has a further prong to its attack on the judgment of the trial court. It says that the same issue now before the antitrust court has already been litigated and resolved partially in favor of Aloha and partially against it. This contention is based upon the fact that on September 16, 1968, Aloha filed a petition with the CAB seeking subsidies for the period *beginning on that date* because it apprehended a continuation of already existing alleged unfair competitive practices by Hawaiian—principally excessive uneconomical overscheduling of flights.

Such a subsidy procedure is authorized under 49 U.S.C.A. §1376(a) and (b).[3]

The petitioner requested a subsidy award of $1,784,784.00 for the year beginning September 16, 1968, and a like amount for each year thereafter. Thereafter Hawaiian Airlines filed a similar petition on October 7, 1968. In its presentation to the CAB Aloha alleged that HAL had engaged in uneconomic scheduling practices throughout 1968 and 1969. On May 16, 1972, the CAB awarded Aloha a subsidy of $789,000.00 for losses which is sustained during the period September 16, 1968, through February 29, 1969. This subsidy was awarded on the finding that for the five and one-half month period Aloha's losses were due to ". . . the uneconomic competition of Hawaiian Airlines]." As to the rest of the period for which Aloha's claim for subsidies was being consid-

[3]Subparagraph (b) dealing with "rate-making elements" provides as follows:

"(b) In fixing and determining fair and reasonable rates of compensation under this section, the Board, considering the conditions peculiar to transportation by aircraft and to the particular air carrier or class of air carriers, may fix different rates for different air carriers or classes of air carriers, and different classes of service. In determining the rate in each case, the Board shall take into consideration, among other factors, (1) the condition that such air carriers may hold and operate under certificates authorizing the carraige of mail only by providing necessary and adequate facilities and service for the transportation of mail; (2) such standards respecting the character and quality of service to be rendered by air carriers as may be prescribed by or pursuant to law; and (3) the need of each such air carrier (other than a supplemental air carrier) for compensation for the transportation of mail sufficient to insure the performance of such service, and together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense."

ered by the Board it was decided that "Quite apart from the wisdom or unwisdom of Aloha's action from a competitive standpoint, it was clearly not 'economical and efficient' within the meaning of the first standard of the Act." The Board, in its opinion stressed the fact "[t]hat the standards for the award of subsidy are somewhat more stringent than the standards governing generally the sound management of a carrier has long been clear," citing Transatlantic Final Mail Rate case, 19 CAB 464, 520 (1954).

The contention by HAL as to this subsidy is two-fold. In the first place it claims that Aloha has received compensation for any actions that would normally be considered as relevant to an antitrust suit arising from excessive scheduling of flights when it received the subsidy award for the five and one-half month period. In the second place it contends that the provisions for subsidy awards is an adequate substitute for the failure elsewhere in the Act to provide for the awarding of damages for conduct that would normally justify the bringing of an antitrust complaint.

The treatment of this claim by the Board in this case, together with a careful reading of the Act itself, makes it plain that the awarding of a subsidy is in no sense intended to compensate one competing carrier for losses inflicted upon it by unfair trade practices committed by another. The subsidy provisions are merely a stopgap to assist a carrier, whose continued existence is recognized to be in the public interest by the Board, to keep its head above water so long as its failure to do so is not the result of its own dishonest, uneconomical or inefficient management. It is to be noted that it has nothing

to do with the reimbursement of lost profits which might otherwise have been legally earned by the injured carrier which, under the antitrust laws is not held to the strict accountability of stringent economy and competence of management required of applicants for subsidies.

In the case before the Board it not only disallowed a substantial amount of the requested subsidy representing items which may very well normally have been includable in the operating expenses of a plaintiff in an antitrust damage suit,[4] but the Board itself drew attention to the fact that the standards for the award of subsidy are somewhat more stringent than the standards governing generally the sound management of a carrier. The Board said in the Transatlantic Final Mail Rate case, *supra:*

> "We are of the firm conviction that every carrier which requires subsidy support must make its management decisions after careful consideration of the effect they will have on the carrier's subsidy requirements. Factors of airline prestige or competitive advantage which may be of primary concern in management decisions in other industries must give way to the effect on required subsidy where the government is called upon to furnish a substantial portion of the total costs of operation."

So, too, the Court of Appeals for the District of Columbia Circuit said in Trans World Airlines, Inc. v. Civil Aeronautics Board, 128 U.S.App.D.C. 126, 385 F.2d 648 at 657, cert. denied, 390 U.S. 944, 88 S.Ct. 1029, 19 L.Ed.2d 1133 (1968):

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[4]Two items of expense claimed by the carrier but disallowed by the Board were "promotion and sales expenses" of $177,133.00 and a write-off of $44,976 for a Viscount aircraft after a ground accident.

> "A subsidy agency may realistically stress diligence to avoid excessive advertising and selling expense since restraints that normally operate on corporate management may be subdued in the case of a subsidized operation, where the managers may be influenced by the possibility if not the prospect that current subsidized advertising expenditures would attract customers who would remain, in good measure, as patrons in the later subsidy free period. The danger of spiraling selling costs is manifest where subsidies are payable to carriers who compete with each other."

Under Aloha's certificate to operate in the State of Hawaii it would, in fact, be remiss if it did not apply for a subsidy to see it through a period of such losses as would threaten its viability as a carrier. Since such subsidies are measured by the amount which is necessary when added to "all other revenue of the air carrier . . . to maintain air transportation to the extent and the character and quality required for the commerce of the United States, the Postal Service, and the national defense," it is clear that such subsidy is no measure of anticipated profits which might be recoverable in an antitrust action. Neither, therefore, can the provision of subsidies be considered as a substitute for damages that may be owed to a carrier either for the period of the subsidy itself or the presubsidy or postsubsidy periods included within an antitrust action.

Little need be said of the other argument of HAL to the effect that the filing of a petition by Aloha against HAL under section 411 complaining of the same overscheduling and other conduct by HAL was either a binding recognition by Aloha that the CAB had exclusive jurisdiction over the matters there at issue or that it

amounted to an election of remedies which would bar a subsequent action for damages in the antitrust court. As has already been indicated, there is no way in which the CAB can award damages for Sherman Act violations. To the extent that the Supreme Court has recognized that certain problems dealing with prospective conduct are exclusively confined to the CAB by section 411, the recognition of such jurisdiction does not exclude the right of a complaining carrier to resort to the courts in matters which do not fall within such jurisdiction. A claim for past damages is such a matter. In this case the complaint alleges damages from a conspiracy beginning in 1968 and running through 1970, after which time the parties had made an agreement with respect to scheduling that caused a dismissal of the section 411 complaint filed by Aloha and a counter-complaint filed by HAL. It is apparent that the parties concluded that they had obtained all that they could reasonably hope to get before the Board under a section 411 type hearing when they agreed by stipulation to a reduction in the overscheduling complained of by Aloha and bound themselves by stipulation to a scheduling program to be effective until July, 1973. Aloha could not, and does not now, contend that the overscheduling practices of the earlier period continued beyond the effective date of the new agreement. It does not claim damages in the antitrust suit for any conduct subsequent to December 31, 1970. We conclude, therefore, that the commencement and termination of the section 411 proceedings do not bar an antitrust action seeking damages only for conduct alleged to continue from 1968 through 1970, merely because this overscheduling produced a subsidy for part

of the period for Aloha and resulted in a compromise solution for the future scheduling of the two airlines in a section 411 proceeding.

We still have for consideration the contention by HAL that even though the CAB may not have had exclusive jurisdiction over all matters dealing with the actions alleged by it as a basis for its antitrust action, it nevertheless had primary jurisdiction. As stated in appellant's brief, "[a]t the very least, the antitrust action in the district court below must be stayed pending exercise by the CAB of its primary jurisdiction to resolve Aloha's claims of unfair competition."

In light of the proceedings that have already been held by the CAB in the subsidy matter and the section 411 hearings, it is difficult to understand precisely what the appellant considers should now be remanded to the Board for further consideration before the unfair competition claims are ripe for court action. It is significant that there is not now, nor has there ever been, any authority in the Board under section 411 or elsewhere to make a factual determination as to the existence *vel non* of all the ingredients of an antitrust suit under the Sherman Act. While there are questions of the application of the doctrine of collateral estoppel to be resolved by the trial court when it considers what effect is to be given to the determinations made by the CAB in the subsidy proceedings that there was uneconomical scheduling by HAL causing the right to a subsidy by Aloha, the elements to be proved as to the existence of Sherman Act violations would under no circumstances be a matter for the Board to decide. It is difficult, therefore, to

see how the court should defer to the Board to permit the parties to seek findings of fact there which would not obviate the necessity for the antitrust court to litigate other issues.

As pointed out by the Supreme Court in Ricci v. Chicago Mercantile Exchange, 409 U.S. 289, 93 S.Ct. 573, 34 L.Ed.2d 525 (1973), the court should stay an antitrust action for prior administrative proceedings under the doctrine of primary jurisdiction if it is likely that a prior agency adjudication of the matters before it will be a material aid to the court in disposing of the antitrust suit. *See* 409 U.S. at 304, 305, 93 S.Ct. 573. In the case before us, it appears that the CAB has done its full task with respect to the matters that are now being urged in the antitrust action. It was requested to, and it did, grant a subsidy for conduct occurring during a period of five and one-half months midway between the start and the conclusion of the alleged antitrust conspiracy, based upon "uneconomical scheduling." It is to be noted that this is all that it need find in order to grant subsidy. It was not requested to, and it did not, find the other ingredients present which would be required in the bringing of an antitrust action. It also held hearings under the section 411 proceedings until the parties, by agreement, obtained by stipulation, the relief they sought for the future, which is all the relief the CAB could have given them in any event.

As pointed out by the trial court the CAB could in no event have authorized by order the conduct which has here been made the basis of the antitrust action. It goes without saying that the CAB could not, by any

order entered by it, authorize overscheduling (which it found to exist) with "the predatory intent and purpose of eliminating plaintiff as a viable competitor" and "with full knowledge of its impact on plaintiff and with the intent of injuring or destroying plaintiff."

Subsequent to oral argument counsel has called attention to the case Price v. Trans World Airlines, Inc., 481 F.2d 844 (9th Cir. 1973). In the *Price* case a plaintiff suing on behalf of a class of non-first class passengers brought an action under sections 1 and 2 of the Sherman Act, 15 U.S.C.A. §§ 15 and 22, alleging an unlawful combination and conspiracy based on the allegation that first class passengers were given headsets to be used in conjunction with inflight movies without charge, but that coach passengers were required to pay a charge for the use of such headsets. The plaintiff appealed to this Court a dismissal of the suit below and this Court modified the order of dismissal and directed that the case be remanded to the trial court with directions "*to stay all proceedings* in accordance with the views expressed" in the opinion. The views expressed by the Court were to the effect that the charge for the use of headsets was a matter of tariff-making for the Board, a function expressly committed to the Board under section 406 of its expertise. The Court found that since, therefore, a determination by the Board that the $2.00 charge would be a proper rate to be fixed for this inflight service this would eliminate any issue to be tried in the antitrust action. Thus, this Court applied the same standard as did the Supreme Court in *Ricci, supra.* It felt it appropriate to defer to the expertise of the

CAB fact findings that were confided explicitly to the Board for its final determination, as is the case with respect to the making of tariffs.

Moreover, we find nothing inconsistent between our views here and the *Price* case, even though we here should consider that this was a matter as to which the Board was expressly charged to exercise its primary jurisdiction. As we have pointed out, the CAB here has already dealt to the full extent of its ability with the matters at issue and there is nothing further to be remanded to it even though the principle of primary jurisdiction were to apply. It has already determined that Aloha was injured by uneconomical overscheduling by HAL. It has no authority under section 411 to make any inquiry or find any facts with respect to the existence of "predatory intent" or purpose to eliminate or destroy Aloha. Nothing else the Board could do would make unnecessary the fact finding in an antitrust suit by the district court.

The other matters raised by appellant need not now be dealt with since the interlocutory appeal was merely from the denial by the trial court of motions to dismiss the complaint or for summary judgment or judgment on the pleadings urged by the defendant. All other matters with which the trial court dealt are still at an interlocutory stage, and will be subject to further orders of that court as the record may develop. We hold merely that the trial court did not err in denying the motions.

The judgment is affirmed.

Appendix C

United States Court of Appeals
For the Ninth Circuit

No. 73-1557
DC# 72-3594 (SPK)

Aloha Airlines, Inc.,
Plaintiff-Appellee,
vs.
Hawaiian Airlines, Inc.,
Defendant-Appellant.

[January 29, 1974]

Before: TUTTLE*, HUFSTEDLER and KILKENNY, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

*Of the Fifth Circuit, sitting by designation pursuant to 28 U.S.C. §294(d) (1970).